COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

ENFORCEMENT MANUAL

December 1, 1999

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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MEMORANDUM

TO: David Johnson, Sharon Brown, David Paylor, Mike Murphy, Harry Gregori, Anthony Moore, John Cunningham, Mary Jo Leugers, John Daniel, Larry Lawson, Hassan Vakili, Brad Chewning, Greg Clayton, Frank Daniel, Tom Henderson, Mike Overstreet, Gerry Seeley

FROM: Dennis H. Treacy

SUBJECT: Department of Environmental Quality's Revised Enforcement Manual

DATE: December 1, 1999

Attached is the Department of Environmental Quality's Enforcement Manual (December 1, 1999). This Manual provides guidance to all DEQ staff for taking appropriate actions to enforce Virginia's environmental statutes and regulations. The procedures in the Manual are designed to promote consistency throughout the Department and to guide the staff in undertaking timely, reasonable, appropriate, consistent, and fair enforcement actions.

Unlike previous versions of this document, this Manual focuses solely on enforcement and does not contain any of DEQ's compliance procedures. As you can see from the size of this document, an attempt to combine all compliance and enforcement procedures into one manual would make the document unwieldy. This fact, however, does not change DEQ's strong commitment toward compliance and providing compliance assistance to the regulated community. In fact, DEQ is increasing its efforts in this regard.

I also want to thank the many staff members who worked to bring this Manual to fruition. This document reflects significant time expenditures and a high degree of dedication to produce a very helpful and comprehensive product that will make our jobs easier and our efforts more easily understood. I also thank the citizens, environmental groups, members of the regulated community, and the Office of the Attorney General for their comments on the procedures contained in this document. All of these efforts have assisted in making the Department's Enforcement Manual a viable tool in carrying out DEQ's mission.

Attachment

CC: The Honorable John Paul Woodley, Jr.,
Secretary of Natural Resources
Roger L. Chaffe, Senior Assistant Attorney General

The Commonwealth of Virginia
Department of Environmental Quality

Enforcement Manual

INTRODUCTION

This Manual provides guidance to the staff of the Department of Environmental Quality ("DEQ" or "Department") for taking appropriate actions to enforce Virginia's environmental statutes and regulations. The policy and procedures set forth below are designed to promote consistency throughout the Department and to guide the staff in undertaking timely, reasonable, appropriate, consistent, and fair enforcement actions.

This Manual consists of several chapters:

Chapter One: Enforcement Policy Considerations

Chapter Two: General Enforcement Procedures

Chapter Three: Classification of Priority Cases

Chapter Four: Civil Charge Calculations

Chapter Five: Supplemental Environmental Projects

Chapter Six: APA Adversarial Proceedings

Chapter Seven: Northern Virginia Vehicle Emissions Inspection & Maintenance Program.

The policies and procedures set forth in this document do not carry the force of law and are intended solely to provide guidance to DEQ staff. If a conflict were to arise between this Manual and the Commonwealth's statutes and regulations, the statute or regulation would control. It follows that DEQ remains free at all times to depart from the guidance of this Manual whenever necessary to carry out the intent of the statutes and regulations.

In addition, should procedures in this Manual appear to conflict with other Department procedures or with state or federal statutes and regulations, the Office of Enforcement Coordination must be notified immediately for resolution before any action is taken. Inquiries regarding the interpretation or application of specific statutes and regulations also are to be directed to the Office of Enforcement Coordination.

Further, if a planned enforcement action is not covered by this Manual or applicable regulation or if it is the first time a procedure or regulation is applied, the proposed action must be discussed with the Office of Enforcement Coordination staff for possible precedent and for consultation with outside agencies.

TABLE OF CONTENTS

ACRONYMS

AIRS	Aerometric Information Retrieval System
APA	Administrative Process Act
APCE	Air Pollution Control Equipment
BACT	Best Available Control Technology
BOD	Biochemical Oxygen Demand
CAA	Clean Air Act
CAPP	Commonwealth Accounts Payable Procedures
CAS	Compliance Auditing System
CEM	Continuous Emissions Monitoring
CFR	Code of Federal Regulations
CI	Compliance Inspection
CO	Consent Order
COD	Chemical Oxygen Demand
DEQ	Department of Environmental Quality
DMR	Daily Monitoring Report
EER	Excess Emission Report
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
ERP	Enforcement Recommendation and Plan
FOIA	Freedom of Information Act
HPV	High Priority Violator
ICL	Informal Correction Letter
I&M	Inspection and Maintenance
ITS	Information Technology System
IU	Industrial User
LAER	Lowest Available Emission Reduction
LEPC	Local Emergency Planning Committee
LFD	Local Fire Department
LOA	Letter of Agreement
LOR	Letter of Reprimand
MACT	Maximum Available Control Technology
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standard for Hazardous Air Pollutants
NOV	Notice of Violation
NPDES	National Pollution Discharge Elimination System
NSPS	New Source Performance Standard

NSR	New Source Review
NTA	Negotiated Testing Agreement
OAG	Office of the Attorney General
OEC	Office of Enforcement Coordination
O&M	Operations and Maintenance
PCS	Permit Compliance System
PSD	Prevention of Significant Deterioration
PTE	Permanent Total Enclosure
QNCR	Quarterly Noncompliance Report
RACT	Reasonable Available Control Technology
RCA	Request for Corrective Action
RCRA	Resource Conservation Recovery Act
RCRIS	Resource Conservation and Recovery Information System
SAAC	Significant Ambient Air Concentration
SEP	Supplemental Environmental Project
SERC	State Emergency Response Commission
SIP	State Implementation Plan
SM	Synthetic Minor
SM/B	Synthetic True Minor
SNC	Significant Noncompliance
SV	Secondary Violator
SWCB	State Water Control Board
T&A	Timely and Appropriate
TOC	Total Organic Carbon
TSDF	Treatment, Storage, and Disposal Facility
TSS	Total Suspended Solids
UST	Underground Storage Tank
VAC	Virginia Administrative Code
VECO	Vehicle Emissions Compliance Officer
VPA	Virginia Pollution Abatement
VPDES	Virginia Pollution Discharge Elimination System

CHAPTER ONE

ENFORCEMENT POLICY CONSIDERATIONS

It is the goal of this Manual to articulate an integrated, multi-media – air, water, and waste – enforcement policy to the extent practicable and permissible by law.

I. ENFORCEMENT MISSION AND GOALS

The Department's enforcement mission is to take fair and consistent enforcement actions to ensure compliance with Virginia's environmental laws and regulations in a manner that promotes the health and well being of the Commonwealth's citizens and protects its environment.

To carry out its mission, the Department has established the following goals:

- To take timely, appropriate, fair, consistent, and effective enforcement actions.
- To approach enforcement, whenever possible, in a helpful, cooperative, and non-confrontational manner.
- To stop and correct repeat and/or ongoing violations.
- To bring facilities into compliance.
- To prevent future violations.
- To remove the economic benefit of noncompliance.
- To ensure economic advantage is not obtained through noncompliance.
- To remediate the environmental impact of past violations.
- To assist the regulated community in achieving and maintaining compliance with environmental requirements.
- To send a clear message that compliance is important.
- To notify appropriate prosecutory authority of suspected violators when there is reason to believe criminal activity is involved.

II. CENTRAL AND REGIONAL OFFICE COORDINATION

The Central Office and each of the Regional Offices play key roles in carrying out DEQ's mission and in achieving its enforcement goals. In the Central Office, the Office of Enforcement Coordination is responsible for all enforcement activities and functions undertaken by the Central Office. The Regional Offices are the primary contacts for the regulated community and the public. For the

majority of the cases, the Regional staff is the first to deal with suspected non-compliance situations, and they are responsible for beginning and concluding enforcement actions.

In general, the Office of Enforcement Coordination serves in a supportive role to the Regional Offices for all of their enforcement activities. The Office of Enforcement Coordination becomes involved in enforcement actions to assist the Regions and/or to provide expertise and policy guidance. In addition, the Office of Enforcement Coordination assists and coordinates successful statewide implementation of DEQ's enforcement programs by developing appropriate enforcement policies and procedures, providing appropriate training to staff, and auditing regional implementation. The Office of Enforcement Coordination staff provides case-by-case advice to the Regional Offices as needed to include developing administrative enforcement and litigation positions and strategies and preparing referrals to the Attorney General's Office. The Office of Enforcement Coordination staff also consults on multi-media cases and serves as liaison to the Attorney General's Office.

Regarding the Environmental Protection Agency ("EPA"), the Office of Enforcement Coordination staff coordinates grant reporting and enforcement activity with EPA and facilitates all regularly scheduled conference calls with EPA. All regions are encouraged to participate in these conference calls in order to promote effective communication and consistency. Topics of particular concern to EPA include reporting criteria, measures of formal and informal performance, potential over-filing of cases, joint actions, and Timely and Appropriate update calls.

Regarding criminal environmental cases, the Office of Enforcement Coordination's Criminal Investigation Unit handles and/or coordinates all case investigations and development of criminal actions with the assistance of the Regional Offices and Central Office staffs. Potential criminal cases are prioritized based upon, but not limited to, knowledge, intent, willfulness, patterns of behavior, environmental impact, and economic benefit.

III. CLASSIFYING NONCOMPLIANCE

All statutory and regulatory violations are subject to enforcement. This principle applies to all facilities (major or minor, permitted or unpermitted) and to all violations of the environmental statutes and regulations administered by the Department.

Violations are classified based upon the seriousness of the alleged violations (*i.e.*, duration, gravity, magnitude, willfulness) and their impact or threat of impact on human health and the environment. This classification is also used to prioritize enforcement actions. Because most of its programs are based on federal requirements, the Department has adopted EPA's terminology for classifying noncompliance, which varies depending on the media involved. The media-specific descriptions of these classifications are found in Chapter Three.

This classification and prioritization system does not imply that lower priority violations will not be subject to enforcement. It merely indicates that the level of attention given to enforcement matters is based upon their environmental and programmatic significance.

IV. ENFORCEMENT PHILOSOPHY

Appropriate enforcement action means that the mechanism used by DEQ to achieve compliance is proportional to the alleged violation, responsive to the facility's compliance history, and protective of human health and the environment. In addition, an appropriate enforcement action, which may include a civil charge and recovery of economic benefit, sends a message of deterrence to the regulated community.

In order for the enforcement program to maintain credibility with the regulated community and the public in general, DEQ must take consistent and fair enforcement actions. This means that the regulated community should expect a similar response to a comparable violation – given its impact on human health and the environment – regardless of the region in which it occurs. While it is important to recognize that each case is fact-specific and must be managed accordingly, consistency should always be a factor in determining the enforcement action. Consistency does not mean, however, blind adherence to past decisions that may no longer be appropriate for one reason or another.

DEQ believes fairness will result when enforcement is pursued consistently within the bounds of the law and applicable regulations. Also to ensure fairness, DEQ remains receptive to good-faith arguments – based on fact, state or federal law, or policy – that a given situation is different and should be treated differently, that a facility is in fact in compliance, or that at least the facility should not receive a heavy civil charge.

DEQ's fundamental principle in choosing a course of action is to use the least adversarial method appropriate to the situation that will achieve DEQ's goals of compliance, correction, and deterrence. It is DEQ's intent, however, to use the full range of enforcement tools available to it as necessary to achieve its goals.

V. OVERVIEW OF ENFORCEMENT ACTIONS

There are a variety of enforcement tools available to DEQ staff to bring sources and facilities into compliance. The least adversarial method is some form of informal enforcement that notifies a facility of suspected noncompliance and encourages self-correction without further Department action. In such a case, the Department does not progress to another level of enforcement or render any decisions regarding whether violations have actually occurred. This enforcement method is called "informal correction."

The informal meeting is an effective communication tool and should be used liberally in enforcement. Among its many benefits is the preservation of scarce DEQ resources since the informal meeting frequently results in compliance without the use of further enforcement. The staff should also use ongoing personal and telephone contacts in this regard. Staff should encourage meetings and other informal contacts whenever possible to bring facilities into compliance expeditiously and to reach a mutual understanding about actions necessary to resolve suspected noncompliance.

More formal enforcement methods involve an administrative, civil, or criminal process that generally result in an enforceable instrument such as an administrative order or judicial decree. Examples of the more formal enforcement methods include Consent Orders, Informal Factfinding proceedings, Formal Hearings, 1186 Special Order proceedings, Emergency Order proceedings, and civil suits.

CHAPTER TWO

GENERAL ENFORCEMENT PROCEDURES

Much of what the Department does to bring facilities into compliance is of a non-adversarial nature and is geared toward the use of consensual means. These actions include Letters of Agreement, informal meetings, and Consent Orders. When non-adversarial means fail or would be inappropriate, adversarial enforcement actions should be pursued. These actions include adversarial Informal Factfinding proceedings, 1186 Special Order proceedings, Emergency Orders, Formal Hearings, and litigation.

The different enforcement actions available to the enforcement staff are set forth below in an ascending, progressive order. Questions regarding the appropriateness and applicability of any of the following enforcement methods are to be directed to the appropriate media specialist with the Office of Enforcement Coordination.

I. ENFORCEMENT ACTIONS

A. INFORMAL CORRECTION

Informal Correction is the most basic approach for rectifying suspected noncompliance. It is used by the compliance/enforcement staff upon observing facts that suggest a noncompliance situation may exist. The Informal Correction method is intended for:

- Suspected deficiencies that can usually be corrected within *30 days or less* and
- Facilities that are infrequent violators.

In the Air Program, Informal Correction may be used for alleged violations at Minor and Synthetic Minor sources, *e.g.*, improper record format, no operation and maintenance ("O&M") procedures, no record of APCE maintenance, construction without a permit with true Minor "potential to emit" ("PTE"), insignificant exceedence of throughput limits (does not cause emissions to exceed major levels/exceedence less than or equal to 110% of limit).

In the Underground Storage Tank ("UST") program, this approach is also appropriate where a facility has completed all of the required upgrades and has failed only to file the appropriate paperwork with DEQ.

This approach is not to be used for Priority Cases (see Chapter Three) or for alleged violations that have resulted or may result in environmental impact or a serious threat of environmental impact. Examples of environmental impact include modeled NAAQS or toxic guideline exceedence or contamination of soil, surface water, or groundwater. Adverse environmental impact should not be assumed to have occurred simply because a facility failed to operate within applicable standards or permit limits.

Upon obtaining reliable information that suggests a violation may exist, the compliance/enforcement staff does the following:

- Document the information.
- Inform the facility of the information in its possession either while onsite or at a later time.
- Document that the facility was so informed.

The staff is encouraged to contact the facility by telephone to discuss the alleged violation and may hold an informal meeting at the Regional Office with the facility to discuss the situation. Compliance guidance and counseling should be provided on-site whenever possible. The staff should also seek a response from the facility regarding when it intends to take action to correct the alleged violation and, if so, within what time period. This information may be given to the facility orally, by an Informal Correction Letter ("ICL"), or by a Request for Corrective Action ("RCA") form. If the facility agrees and takes corrective action within 30 days, no further enforcement action should be required. All contacts and requests to the facility must be documented in the file.

No civil charge or Consent Order is used for this level of enforcement, and management is minimally involved above the compliance/enforcement staff level. The corrective action outcome must be documented on an inspection form or other document.

B. WARNING LETTERS

This level of enforcement action is initiated by DEQ staff, upon staff recommendation, to clarify the nature of the alleged violation for the benefit of the facility and to address alleged violations that can usually be corrected within 90 days or less. A Warning Letter is not a case decision or determination that violations have in fact occurred, which would require administrative process to be afforded to the facility prior to such a decision or determination being made.

Do not use a Warning Letter for:

- Priority Cases (see Chapter Three).
- When the alleged violations would trigger the issuance of a Notice of Violation.
- Where it is anticipated that corrective action will take longer than 90 days.

If corrective action cannot or will not be achieved within 90 days, the staff should instead consider using a Letter of Agreement or Consent Order to resolve the alleged noncompliance.

1. General

This action requires a written confirmation that the suspected violation was addressed, a follow-up site visit, or both. Follow-up site visits must be documented in the file. Compliance assistance decisions at this level should be made with broad staff participation.

The Warning Letter must be provided in a timely manner to the operator of the facility, with a copy sent to the owner. A Compliance Inspection ("CI") should usually be conducted to determine or verify the cause of the reported alleged violation(s), to ascertain if there are other potential violations, and to provide compliance assistance to the facility.

Tracking and follow-up are critical to the success of the agency's effort to emphasize compliance assistance. Every deadline for corrective action should be checked within 15 working days after the deadline date. If the deadline has not been met, follow-up action should be initiated at the next highest level so that the compliance effort increases until compliance is achieved.

2. Content of Warning Letters

The following must be included in a Warning Letter:

- Statement of facts – not opinions, conclusions, or conjecture – as the Department knows them to be.
- Citations to applicable standards or regulation for each fact. A Warning Letter must not state that a facility "has violated" or "is in violation of" a standard or regulation because that may imply incorrectly that a case decision has been made.
- Statement of statutory authority and enforcement options available to the agency.
- Notice that failure to solve the suspected problem may result in further enforcement activity.
- Request for corrective action to include a compliance plan and schedule, if necessary.
- Suggestion of a reasonable date-certain for performance.
- Statement that this matter is being tracked by compliance staff.
- Statement explaining how compliance will be verified.
- Disclaimer that the Warning Letter is neither a case decision under the Administrative Process Act, Code § 9-6.14:1 *et seq*., nor an adjudication.
- Department contact person.

3. Boilerplate Warning Letter

A boilerplate Warning Letter is found at Attachment 2A-1. This boilerplate is to be used for the issuance of all Warning Letters except where a specific Warning Letter boilerplate has been developed and approved by the Office of Enforcement Coordination for a particular category. Specific Warning Letter boilerplate has been approved for:

- The UST program. See Attachment 2A-11.

If the boilerplate does not address a particular situation, the Office of Enforcement Coordination staff must be contacted before proceeding further.

4. Additional Warning Letters

Additional Warning Letters must be issued for each additional suspected violation unless other, more serious enforcement action is taken. Additional Warning Letters are issued in the Water Program for each additional point in the CAS unless other, more serious enforcement action is taken.

5. Inability to Meet Compliance Deadline

If a facility is unable to meet a compliance deadline, the facility should immediately notify DEQ and provide it with documentation supporting the inability to do so. A compliance date may be extended by DEQ if the delay is caused by circumstances beyond the facility's control and not due to a lack of good faith or diligence on its part and if the facility has notified the Department as soon as those circumstances became apparent. Any extension shall be in writing and shall specify the reason for the extension. Failure to meet the deadline without just cause or a failure to notify DEQ of the inability to meet the deadline should result in an escalation in the type of enforcement pursued.

In the Air Program, the first day in exceedance of the compliance date shall be the Evaluation Date for this purpose.

C. NOTICES OF VIOLATION

A Notice of Violation ("NOV") is a written notice to a facility informing it of facts that suggest a possible violation of the law or regulations may have occurred, coupled with an invitation to respond. An NOV is not a "case decision" or determination that violations have in fact occurred, which would require some type of administrative process – like an Informal Factfinding or Formal Hearing – to be afforded to the facility prior to such a decision or determination being made. For a more thorough discussion of case decisions and these types of proceedings, see Chapter Six.

Once an NOV is issued, the Regional Office enforcement staff initiates talks with the facility, if it has not done so already, to achieve compliance as expeditiously as possible.

1. Appropriate Uses of NOVs

NOVs are to be used whenever the staff has facts giving it reason to believe that one of the following situations may exist. This is not an exhaustive list.

- Suspected violations at any facility meeting the criteria for a Priority Case (see Chapter Three).
- Repeated and/or continuing suspected violations despite previous informal actions.
- Suspected violations which appear to have caused potential or demonstrated adverse human health or environmental impacts.
- Suspected violations which appear to present an imminent and substantial hazard to human health or the environment.
- Suspected significant violations of administrative orders or judicial mandates and decrees.
- Failure to report violations when required by law.
- Failure to pay civil charges.
- Failure to take timely and appropriate required action in response to a spill or other release to the environment.
- Suspected falsification of certifications, reports, or other documents submitted to the Department (since such actions may be criminal, NOVs are issued only after consultation with the Criminal Investigation Unit, Office of Enforcement Coordination (see § I.I.2, Criminal Prosecution)).
- Suspected violations that appear to include gross negligence and/or that appear to be knowing or willful (since such actions may be criminal, NOVs are issued only after consultation with the Criminal Investigation Unit, Office of Enforcement Coordination (see § I.I.2, Criminal Prosecution)).
- Cumulative violations of the Water Program requirements, not necessarily repeated or continuing for a single parameter or type that trigger action under CAS.
- In the Solid Waste Program, for multiple non-major or minor alleged violations of a regulation or permit for which no previous informal action has been taken.
- In the Water Program where four points are accrued based on the Point Assessment Criteria shown in Chapter Four.
- In the UST Program where a facility fails to sign a Letter of Agreement ("LOA") within the time allowed, fails to comply with a condition of the LOA (*i.e.*, does not secure a contractor within 90 days), or the facts require the initiation of enforcement at the NOV stage.

2. Content of NOVs

The following must be included in an NOV:

- Statement of facts – not opinions, conclusions, or conjuncture – as the Department knows them to be.

- Citations to applicable standards or regulation for each fact. An NOV must not state that a facility "has violated" or "is in violation" of a standard or regulation because that implies a case decision has been made.
- Statement of statutory authority and enforcement options available to the Department.
- Request that the facility respond to the NOV and provide (1) any corrections to the record and (2) a statement of its position on whether the proposed enforcement is necessary.
- Request for corrective action.
- A disclaimer that the NOV is neither a case decision under the Administrative Process Act, Code § 9-6.14:1 *et seq*., nor an adjudication.
- Department contact person.
- If not already provided, the NOV should also include a copy of the inspection report, other documentation, or a summary of documentation of the alleged deficiency.

3. Boilerplate NOVs

A boilerplate NOV form is found at Attachment 2A-2. The boilerplate is to be used for the issuance of all NOVs except where a specific NOV has been developed and approved by the Office of Enforcement Coordination for a particular category or situation. Specific NOV boilerplates have been approved for:

- The UST program. See Attachment 2A-12.
- An alternate form that can be used, but is not required, for alleged violations of Discharge Monitoring Reports ("DMRs"). See Attachment 2A-16.

If the boilerplate does not address a particular situation, the Office of Enforcement Coordination staff must be contacted before proceeding further.

D. LETTERS OF AGREEMENT

A Letter of Agreement ("LOA") is an informal enforcement mechanism, which represents a non-binding agreement between the facility and the Regional Office (pursuant to authority delegated to it) to correct suspected violations. The LOA must cite the alleged violations and state which corrective actions the facility has agreed to take. Civil charges cannot be assessed in an LOA. Either the Regional Director signs the LOA or the Compliance and Enforcement Manager signs the LOA on behalf of the Regional Office.

The LOA is not a statutory enforcement tool. It does not discharge liability for alleged violations and cannot be used as a defense to federal or state enforcement or to a citizen suit.

1. When Not To Use an LOA

LOAs are not to be used for:

- Periods longer than twelve months.
- Setting interim effluent or emissions limits.
- Repeat offenders.
- Operating pending permit issuance.
- RCRA facilities.
- Continuous Emission Monitoring.
- Priority Cases (see Chapter Three).

2. Boilerplate Letter of Agreement

A boilerplate LOA is found at Attachment 2A-3. This boilerplate is to be used for the issuance of all LOAs except where a specific LOA boilerplate has been developed and approved by the Office of Enforcement Coordination for a particular category or situation. Specific LOA boilerplate has been approved for:

- The UST program. See Attachment 2A-13.

If the boilerplate does not address a particular situation, the Office of Enforcement Coordination staff must be contacted before proceeding further.

E. CONSENT ORDERS

A Consent Order ("CO") is an administrative order issued with the consent of the owner or other responsible party, to perform specific actions to come into compliance with the relevant law and regulations. They are usually used with private, federal, or local entities. (For enforcement against state agencies, see § I.F (Executive Compliance Agreements)). The Regional Offices are responsible for developing Consent Orders and generally draft them after one or more meetings with the facility. COs are developed cooperatively and entered into by mutual agreement, even though the Consent Order is a direct order to the facility to comply. They therefore are issued without an adversarial proceeding. A CO may or may not include a determination that a violation has occurred.

For clarification, Consent Orders are not the same as consent decrees. Consent Orders are administrative orders issued by the agency, whereas consent decrees are issued only by a court.

1. Boilerplate Consent Order

A boilerplate Consent Order is found at Attachment 2A-4. This boilerplate is to be used for the issuance of all COs except where a specific CO boilerplate has been developed and approved by the

Office of Enforcement Coordination for a particular category or situation. Specific CO boilerplate has been approved for:

- The UST program. See Attachment 2A-14.

If the boilerplate does not address a particular situation, the Office of Enforcement Coordination staff must be contacted before proceeding further.

2. Appropriate Uses of Consent Orders

Consent Orders may be used to:

- Establish an enforceable course of action for bringing a facility into compliance expeditiously by, among other things: (i) setting interim emissions and effluent limits; (ii) requiring a facility to get a permit; (iii) providing schedules for upgrades, modifications, startups and shakeouts; (iv) requiring site assessment and remediation; and (v) imposing new control technology testing and implementation.
- Assess and collect civil charges for past violations of environmental statutes and regulations, consistent with appropriate Department guidelines, to include the recovery of economic benefit.
- Explain what types of actions DEQ may take if the facility fails to meet the deadlines in the Consent Order.
- Recoup appropriate costs, including those associated with fish kills.

3. Enforcement Recommendation and Plan

The staff documents its justifications for the proposed enforcement resolution in an Enforcement Recommendation and Plan ("ERP"). ERPs should be brief and concise and need not be longer than two pages. In most cases, the ERP is completed before beginning negotiations with the facility unless a meeting is needed to gather information from the facility to complete the ERP. The ERP must:

- Discuss the alleged violations.
- Assess the strength and weaknesses of the case.
- Discuss various available enforcement tools and strategies.
- Make a recommendation for enforcement action.
- If appropriate, suggest either a civil charge or a negotiation range.

If a civil charge is suggested, the civil charge analysis must be attached to the ERP. The ERP is signed by appropriate DEQ management and is kept in the case file to show that the recommended action has the approval of management. The authority to determine the appropriateness of settlement actions recommended by their staff has been delegated by the Director to the Regional Directors.

ERPs are to be revised accordingly if substantial changes are appropriate based on new information discovered during the negotiation process. A boilerplate ERP form is found at Attachment 2A-5.

During the active administrative investigation, an ERP is not subject to production under the Freedom of Information Act ("FOIA"). Once the investigation is concluded (*i.e.*, Consent Order is signed), however, ERPs may be subject to production under FOIA if no other exemption or privilege applies.

See section 8 below regarding the Office of Enforcement Coordination review of ERPs.

4. Civil Charges

Where authorized by statute, the Department may by consent impose civil charges in a Consent Order pursuant to media-specific criteria. Civil charges are used to address:

- An amount reflecting the degree of environmental damage.
- The amount necessary to deter future noncompliance by the same or another party.
- The history of noncompliance.
- The economic benefits accruing to a party from delayed or avoided compliance.

Civil charges are assessed using the guidelines in Chapter Four. See section 8 below regarding the Office of Enforcement Coordination review of ERPs that recommend civil charges.

5. Suspended Civil Charges

A "suspended civil charge" is a civil charge recited in a Consent Order that has been suspended or held in abeyance pending the full completion of the terms of a Consent Order. The civil charge would not be paid if the Consent Order is fully complied with.

Suspended civil charges may be included in a Consent Order only upon the recommendation of the Director of the Office of Enforcement Coordination and the approval of the Director. They are used only for extraordinary or compelling circumstances and only on a case-by-case basis. The following would be an appropriate use of suspended civil charges under the extraordinary or compelling circumstances concept:

- Facility Resource Allocation: It may be appropriate to suspend all or part of the civil charge if the facility has sufficient resources so as to not be defined as "unable to pay," but the payment of the civil charge would present a genuine economic hardship. This justification is likely to present sufficient compelling circumstances only when the Consent Order at issue also included substantial injunctive relief. Local governments, public interest entities (clinics or nursing homes, low income housing), and nonprofit organizations may be appropriate candidates for consideration here.

See section 8 below regarding the Office of Enforcement Coordination's review of ERPs that recommend suspended civil charges.

6. Supplemental Environmental Projects

Supplemental Environmental Projects ("SEPs") are environmentally beneficial projects that a facility agrees to undertake as part of a CO in partial settlement of an enforcement action for which the facility is not otherwise legally required to perform. See Va. Code § 10.1-1186.2. Department staff must follow the SEP procedure provided in Chapter Five. See section 8 below regarding the Office of Enforcement Coordination review of ERPs that recommend SEPs.

7. Finalizing the Consent Order

Once prepared in accordance with the ERP and reviewed by the Office of Enforcement Coordination as required in section 8 below, the draft Consent Order is sent to the facility for review. Before finalizing the CO the Regional Office considers the facility's comments and, where appropriate, incorporates them into the final Consent Order. Where the facility's comments represent a substantive difference between the facility and the Department, a conference or other means should be used to resolve those differences.

All provisions in a Consent Order are to be agreed to before it is signed by an authorized official of the facility and the Department. The facility will be required to sign the order first. The Regional Director would then sign the CO on behalf of the Director of DEQ. Copies of all executed final Consent Orders shall be sent to the Office of Enforcement Coordination.

- Water Consent Orders: By law, all water Consent Orders must be approved by the State Water Control Board ("SWCB") and advertised for public comment for 30 days. Before a Consent Order is presented to the SWCB, the public comment period must be completed. Recommendations to the SWCB for approval of Consent Orders must contain a request for delegation of signature authority and cancellation authority for compliance to the "Director or his designee." Orders must be submitted to the Central Office for inclusion in the SWCB meeting agenda review and SWCB briefing books in preparation for presentment to the SWCB at its quarterly meetings. Under the State Water Control Law and permit regulation, Consent Orders for VPDES and VPA must be public noticed in a general circulation local newspaper and in the *Virginia Register*. In addition, Consent Orders purporting to remedy discharge violations must be noticed directly to the municipal entity in which the discharge is located, according to Code § 62.1-44.15:4(E). Virginia Water Protection permits (Va. Code § 62.1-44.15:5) are also covered by the State Water Control Law and consequently may be subject to the same public notice requirements.
- Hazardous and Solid Waste Consent Orders: As required by 9 VAC 20-60-70(G) and 9 VAC 20-80-110(E), Waste Program Consent Orders must receive proper public notice prior to issuance. Notice of a CO signed by a party should be published in a local

newspaper and broadcast over local radio stations at least 30 days before the Consent Order is signed by the Department except where the CO requires some immediate action. Unlike water Consent Orders, Waste Consent Orders are not required to be published in the *Virginia Register*.

- Air Consent Orders: Consent Orders issued in the Air Program are not subject to public comment or Board review and are not published in the *Virginia Register*.

A sample transmittal letter for publication of notice in the *Virginia Register* is found at Attachment 2A-6. The *Virginia Register's* processing of the notice takes at least 19 days. An updated copy of the Registrar's Publication Deadlines and Schedules are provided in each issue of the *Virginia Register*, or may be obtained from the Registrar's office. A *Directory of Virginia Newspapers* may be obtained from the Virginia Press Association, Post Office Box 85613, Richmond, VA 23285-5613 (804-550-2361).

8. Review by Office of Enforcement Coordination

The Office of Enforcement Coordination reviews for consistency all ERPs and draft Consent Orders that are being negotiated with Priority Cases. It also reviews for consistency all ERPs and draft Consent Orders containing Supplemental Environmental Projects ("SEPs"), civil charges in excess of $25,000, and compliance schedules lasting longer than two years. As noted above, all Consent Orders proposing to include a suspended penalty must be approved by the Director upon recommendation of the Director of the Office of Enforcement Coordination.

Where the Office of Enforcement Coordination review is required, the Regional Offices are encouraged to discuss ERPs and Consent Orders with the Office of Enforcement Coordination staff during their development and prior to being sent to the Office of Enforcement Coordination for review. The Regional Offices provide ERPs and draft orders to the OEC for review before they are sent to the facility. The Office of Enforcement Coordination staff will respond within three days to the Regional Office with its comments, provided the case has been discussed by the staffs beforehand. A longer time may be required if the case has not been discussed previously.

9. Collecting Civil Charges

After a CO has been executed, the time clock for paying the civil charge starts. The Commonwealth Accounts Payable Procedures Manual ("CAPP") governs the management of accounts payable and receivable to state agencies. The day an order is executed, the civil charge becomes an account receivable, and all accounts receivable are the responsibility of the Fiscal Office. It is imperative the Fiscal Office receive a copy of the executed order so it can initiate the CAPP tracking procedures. The Fiscal Office will copy the Regional Office on copies of dunning letters and will keep the specialist informed when a party pays. The Fiscal Office has the responsibility for referring cases to a collection agency or the Attorney General's Office for collection of past due civil charges.

In order to assist in collecting civil charges, all COs must specify that the payment check include the party's Federal Identification Number and a notation that it is for payment of a civil charge pursuant

to the CO. The CO must also indicate that the civil charge payment is to be made out to the Treasurer of Virginia and sent to the following address:

Receipts Control
VA DEQ
P.O. Box 10150
Richmond, VA 23240

10. Terminating Consent Orders

A Consent Order may be terminated by a letter signed by the Regional Director and sent to the facility, stating that the Consent Order is terminated because the facility has met all of the terms and conditions of the Consent Order. Water Consent Orders, however, can be terminated only by the State Water Control Board after 30-day notice to the affected party unless the particular order contains specific self-termination language governing its expiration.

F. EXECUTIVE COMPLIANCE AGREEMENT

Enforcement against state agencies is to proceed in the same manner and consistent with enforcement against all other facilities where permitted by law. An Executive Compliance Agreement is used when dealing with state agencies. Consent Orders and Executive Compliance Agreements are similar in most respects. Executive Compliance Agreements, however, never contain civil charges because civil charges are not assessed against a state agency. They also are not enforceable in court. In drafting an Executive Compliance Agreement, the procedures for Consent Orders should be followed.

A boilerplate Executive Compliance Agreement is found at Attachment 2A-7, and a boilerplate Executive Compliance Agreement for UST is found at Attachment 2A-15. This boilerplate is to be used for the issuance of all Executive Compliance Agreements except where a specific boilerplate has been developed and approved by the Office of Enforcement Coordination for a particular category or situation. If the boilerplate does not address a particular situation, the Office of Enforcement Coordination staff must be contacted for discussions on how to proceed.

G. APA ADVERSARIAL PROCEEDINGS

The Virginia Administrative Process Act ("APA") provides two processes for addressing noncompliance in an adversarial setting. They are: (1) the adversarial Informal Factfinding proceeding provided for in § 9-6.14:11 of the APA, which also governs the 1186 Special Order proceedings; and (2) Formal Hearings provided for in § 9-6.14:12 of the APA. Detailed procedures for conducting these proceedings are found in Chapter Six.

H. EMERGENCY ORDERS AND EMERGENCY SPECIAL ORDERS

Each of the media basic laws provides for the issuance of administrative Emergency Orders in the event special circumstances exist that require immediate action to abate imminent and substantial injury or damage. *See* Va. Code § 10.1-1309(B) (Air); §§ 10.1-1402(18) and (21), § 10.1-1409(D) (Waste); § 62.1-44.15(8b) (Water). In the Air and Water Laws, Emergency Orders are called Emergency Special Orders. Here they are referred to collectively as "Emergency Orders." Be sure to review these laws for specific mandates regarding the issuance of Emergency Orders, including the time required for hearings on cease and desist orders.

Emergency Orders are the administrative equivalent of temporary injunctions. They are effective upon service and are issued without the consent of the facility to which it is directed. The facility is given little or no prior notice or opportunity to comment. By law, a Formal Hearing must be held promptly after reasonable notice to the facility to affirm, modify, amend, or cancel the Emergency Order. The basic law must be consulted regarding the rights of persons subject to Emergency Orders.

The following steps are to be taken before issuing an Emergency Order:

- Sketch out the case.
- Determine whether the statutory criteria have been met for an Emergency Order including any declarations or findings.
- Contact the Attorney General's Office to discuss the appropriateness of the proposed action and the proper procedures to be followed.
- Prepare the Emergency Order, which must set forth:
    - The purpose of the Emergency Order.
    - The authority to issue the Order.
    - A clear and concise statement of the facts constituting the emergency and any necessary declaration or finding.
    - A clear and concise statement of what the party is ordered to do or refrain from doing.
    - A statement of the party's right to a subsequent hearing.
- Line Up a Hearing Officer. See Chapter Six.
- Prepare the Notice of Hearing.
- Determine whom to serve and then serve the order and notice.

The executed Emergency Order must be transmitted to the party by a means that is quick, certain, and verifiable, *e.g.*, hand-delivery, sheriff service, express carrier, process server. A copy of the order may be transmitted by facsimile if receipt is confirmed. A copy should also be sent by certified mail, return receipt requested, if not delivered by hand.

Circumstances serious enough to issue an Emergency Order are also in all likelihood serious enough to require notice to the local government of the alleged violations. See Code §§ 10.1-1310.1 (Air), 10.1-1407.1 (Waste), and 62.1-44.15:4 (Water).

In the case of Emergency Special Orders issued under the Water Law, the issuing party must notify the Office of Policy and Legislation to poll the Water Board members by telephone after the Order is issued to schedule the Board meeting to address the Emergency Special Order.

I. JUDICIAL ACTION

Judicial enforcement of Virginia's environmental laws and regulations can be pursued by means of civil suits and criminal prosecutions depending on the facts of the alleged violations.

1. Civil Suit

After attempting all other appropriate options, the Director may determine that court action is the next appropriate step. Civil litigation should be considered only after all reasonable administrative options have been exhausted. Remedies include temporary and permanent injunctions and civil penalties. Referrals are to be drafted according to the Office of the Attorney General Protocol.

A referral to the Office of the Attorney General ("OAG") may be appropriate where:

- Enforcement staff has been unable to obtain compliance by any other means.
- An order has been violated.
- A serious threat to human health and the environment is present.
- There are ongoing violations.
- The party has a history of noncompliance.

Only the Director of DEQ is authorized to refer cases to the OAG. This authority has not been delegated. Thus all referral packages, once finalized, are sent to the Director for approval and transmittal to the OAG.

Referral packets are prepared by the Regional Office staff with the assistance of the Office of Enforcement Coordination staff. Each packet is to be discussed with the OAG before it is finalized to make sure it is complete and in proper order. The Regional Office staff and OEC must also make sure the remedy sought is authorized by the governing statute and regulations. The referral package must contain an authorization to sue letter signed by the Director, a memorandum in support of litigation, and appendices containing the regional enforcement recommendation, the Notice of Violation, and a copy of the regional file.

If the OAG accepts the referral and files suit, the enforcement staff and OEC staff, where appropriate, assist in case preparation and provide litigation support.

In addition, in the Water Program a 15-day letter is sent to the facility, notifying it that DEQ plans to ask the State Water Control Board to authorize it to refer the matter to the Attorney General's Office for judicial enforcement. See Attachment 2A-8.

2. Criminal Prosecution

If there is evidence of criminal activity, the regional staff must notify the Office of Enforcement Coordination Criminal Investigator and prepare a criminal referral package consisting of the completed form *Criminal Investigation Notification Routing -- Confidential* (see Attachment 2A-9), the case file and any evidence demonstrating criminal activity. Criminal prosecution under Virginia environmental laws is undertaken by Commonwealth's Attorneys and by federal prosecutors. Department support is coordinated by the Office of Enforcement Coordination. The Regional staff provides assistance as requested.

A criminal referral does not preclude the exercise of DEQ's administrative remedies, and all regional compliance and enforcement activities continue after the case is referred. Civil actions should proceed unless written notification to the contrary is provided by the Office of Enforcement Coordination. Efforts are to be made, however, to minimize interference and overlap. In instances where there are parallel civil and criminal proceedings or an ongoing criminal investigation, the Criminal Investigation Unit must be notified of all proposed civil remedies. In some cases, remedies sought in a civil action (administrative or judicial) may affect the ability to pursue criminal enforcement.

J. REFERRAL OF CASES TO EPA FOR ENFORCEMENT

DEQ intends to use all available means to address violations of the laws and regulations it is mandated to enforce. One such mean is a referral of a case to EPA for enforcement. Referrals to EPA, however, are used only on rare occasion.

1. Criteria for Considering a Referral to EPA

The following criteria are to be considered in determining whether to refer a case to EPA for enforcement:

- All reasonable administrative options have been explored and attempted, where appropriate, and such efforts have not brought the case to an acceptable conclusion.
- The Attorney General's Office has been consulted and concurs with the recommendation to refer the case to EPA.
- DEQ has insufficient resources to pursue the case adequately because of the nature and/or complexity of the case.
- The case has interstate interests that warrant a more extensive action from EPA.
- The responsible party is out-of-state and beyond the reaches of DEQ.

- Federal remedies are more appropriate or adequate to address the alleged violations.

2. Process for Referring a Case to EPA

The Director makes all final decisions to refer a case to EPA for enforcement upon the recommendation of the Director of the Office of Enforcement Coordination ("OEC"). Before doing so, the Regional and OEC staffs discuss the merits of the case, applying the criteria set forth above. At the same time the staffs will discuss the case with the Attorney General's Office for advice regarding available options. A case will not be referred to EPA if there is agreement that other options should be pursued or it should be referred to the Attorney General's Office. The staffs also receive input from EPA regarding the potential referral.

If it is determined that a particular case should be referred to EPA, the Region would transmit the referral package to the Director of the Office of Enforcement Coordination with a short cover memorandum from the Regional Director transmitted through the OEC Director to the Director. The memorandum would request a referral to EPA, explaining that the criteria for referral had been met.

The referral package to EPA would include a letter from the Director (prepared by OEC), a brief memorandum prepared by the Region outlining the facts of the case, and attachments relevant to explain the case to EPA. The attachments may include the whole file or only select documents (*i.e.*, NOV, draft consent order, reports) in the file, depending on the file's size. Additional information will be provided to EPA upon request.

II. CASE CLOSURE AND DEREFERRAL

Enforcement actions are concluded one of two ways: (1) a case may be closed if full compliance has been achieved or (2) a case may be "dereferred," meaning that an enforcement action is being terminated for one reason or another without being brought to full closure. The same Case Closure Memorandum form is used in both situations. See Attachment 2A-10.

A. CASE CLOSURE

When no further action is required and satisfactory compliance has been achieved, a case is ready to be closed. In closing a case the enforcement specialist determines, along with the compliance and permitting staff if necessary, whether all terms of the LOA or Consent Order and all other requirements have been met. This includes permits obtained, closure plans submitted, plans implemented, civil charges paid, and completion of any other requirement imposed as part of the enforcement action.

The specialist prepares a Case Closure Memorandum, which is similar to an ERP. The Memorandum identifies the facility, the violations addressed, the corrective action performed, the date of the order or other enforcement action taken, and the justification for the Case Closure. The justification may include a report from the inspector that the facility is in compliance or a letter from the permitting staff that clean closure has been achieved. The inspection report would be attached to the

Case Closure Memorandum. The enforcement specialist and appropriate management sign the Case Closure Memorandum.

In the case of Water Enforcement Actions, the Consent Special Order may have to be brought before the Water Board for cancellation depending on its terms.

Once the Case Closure Memorandum is finalized, it is placed prominently in the file identifying the case as closed. At the same time the facility is notified by letter from the Regional Director that the case is closed for the reasons specified in the Case Closure Memorandum. This letter serves as sufficient notice to the party that the enforcement action has been terminated. Appropriate permitting and/or Office of Enforcement Coordination staff are also notified and provide a copy of the letter to the facility, if requested.

A boilerplate Case Closure Memorandum is found at Attachment 2A-10.

B. DEREFERRAL

As noted above, "Dereferral" means that an enforcement action is being terminated for one reason or another without being brought to full closure. Reasons for Dereferral include, but are not limited to:

- No enforcement action is required.
- No enforcement action will achieve compliance and the facility has ceased non-compliant activities. For example, a person has stopped illegally dumping waste, but the Department is unable to get the person to clean up the waste due to a lack of resources.
- The facility has closed permanently and the Department is unable to pursue enforcement as a result.
- The Department is unable to locate the responsible owner and operator, *i.e.*, they have moved out of state.
- All administrative enforcement actions have been pursued or considered and none have or will result in compliance, and a referral for court enforcement is not appropriate.

In Dereferring a case, the enforcement specialist prepares a Case Closure Memorandum, which is prepared and processed in the same manner as discussed in the previous section. Since no enforcement action was taken, there is no requirement to notify the facility. If the case is being Dereferred because no enforcement action is required, the facility may be notified of that fact.

Dereferral is not appropriate, however, for RCRA cases that are still in RCRIS unless all enforcement avenues have been explored and EPA agrees with the decision not to pursue the case further.

A boilerplate Case Closure Memorandum is found at Attachment 2A-10.

III. ENFORCEMENT TRACKING AND REPORTING

Regional staff track all enforcement cases to document adherence to statutory and regulatory requirements and the achievement of agency goals and EPA grant conditions. For each media where applicable, compliance tracking is implemented consistent with EPA enforcement policy requirements. Appropriate regional staff shall confer monthly to evaluate ongoing enforcement matters. At a minimum, cases shall be reviewed quarterly.

For formal enforcement actions, each region shall maintain an enforcement case tracking list showing progress of all cases until settlement is achieved or administrative or judicial agreements are in place. This tracking list shall be provided to the Central Office upon request.

The Regional Offices shall also maintain monthly numerical counts of enforcement activities undertaken. A page for enforcement activity tracking is included in the monthly Director's Report on K:\Agency and is called ROMORPT. Regional Offices will use this form to report monthly activity to the OEC.

The Regional Offices send a copy of all issued NOVs, ERPs, and Consent Orders to the Office of Enforcement Coordination, which coordinates necessary tracking for EPA. Additional monthly and quarterly information for each media will be requested as required by each grant.

In the Air Program, all Excess Emission Reports ("EERs") shall be forwarded to the Central Office after Regional Office review within 30 days of receipt from each source. All data entry into the federal database ("AIRS") will be completed by the Central Office.

A. HAZARDOUS WASTE PROGRAM REPORTING TO EPA

The hazardous waste program is administered by the Commonwealth for EPA. Because the hazardous waste portion of the waste program is funded by EPA grant money, all hazardous waste activity must be reported to EPA. DEQ notifies EPA of its hazardous waste activity through the Resource Conservation and Recovery Act Information System ("RCRIS") system. RCRIS is EPA's database of inspection, enforcement and permitting information for RCRA-regulated facilities. Any time the specialist takes an action on a hazardous waste case, the action is recorded and reported on the Evaluation-Violation-Enforcement Form. This form is sent to the RCRIS administrator in the Central Office for transmittal to EPA.

Practically all actions are recorded on the RCRIS form. There is a code for referral from compliance, a code for issuing a draft order, a code for issuing the revised order, codes for an executed order, and codes for referral to EPA. Prompt reporting of hazardous waste enforcement actions is essential to maintaining DEQ's grant funding.

Another way EPA tracks DEQ's enforcement actions is by the Timely and Appropriate ("T&A") List. RCRA policy states that cases are to be resolved within 300 days. If the case is not resolved, it may be placed on the T&A list which shows how long a facility has been out of compliance. If the case remains on the T&A list for too long, DEQ runs the risk of an EPA overfile. In order to avoid an overfile, the specialist must take care to document all hazardous waste enforcement actions.

B. AIR PROGRAM REPORTING TO EPA WITH "AIRS"

Enforcement activities must be reported both internally (Office of Enforcement Coordination) and to EPA through Aerometric Information and Retrieval System ("AIRS"). The internal report requires submittal of information on all levels of enforcement through an established report format.

Reporting of enforcement-related activities to AIRS is necessary for "formal" enforcement actions (NOV and CO). These actions may be entered directly into AIRS or through ITS as a batch upload. Section 105 Grant commitments require that this type of information be entered into AIRS within 30 days of the activity or occurrence. In addition to the actions specific to NOVs and COs, action entries for "Civil Charge Assessed," "Civil Charge Received," and "Final Compliance" may be necessary.

C. WATER PROGRAM REPORTING TO EPA WITH "PCS"

EPA tracks the performance of the Commonwealth's VPDES facilities through its Permit Compliance System ("PCS") Database, which is updated by the Office of Enforcement Coordination staff monthly. All reportable noncompliance by Majors is reported quarterly on the Quarterly Noncompliance Report ("QNCR"). The QNCR summarizes noncompliance information for all Major facilities violating the terms and schedules of NPDES permits, enforcement actions, and pretreatment programs. The QNCR is used by EPA to compare the activities of regional and state authorities for consistency and ensuring that timely and appropriate enforcement is initiated. This reporting is required by the Commonwealth's federal 106 water grant.

By the last day of each month, Regional compliance staff electronically transmits the previous month's DMR data for all Major permits to the Office of Enforcement Coordination (*e.g.*, January data is transmitted to OEC by February 28). OEC staff reformats the data and transmits the DMR data electronically to PCS monthly. OEC then generates a "missing data report" from PCS, which identifies missing data and missing DMRs from the Regions. OEC and the Regions work together to obtain the missing data and OEC then uploads PCS accordingly.

Before the QNCR is finalized and sent to EPA, the OEC staff works to validate and correct, as necessary, the data contained in the QNCR. In doing so, OEC works with the Regional Office to identify and correct errors. Failure to do so may result in a facility being reported as significant noncompliance ("SNC").

ATTACHMENTS

2A-1	Warning Letter Boilerplate
2A-2	Notice of Violation Boilerplate
2A-3	Letter of Agreement Boilerplate
2A-4	Consent Order Boilerplate
2A-5	Enforcement Recommendation and Plan Boilerplate
2A-6	Sample Transmittal Letter for Publication of Notice in *Virginia Register*
2A-7	Executive Compliance Agreement Boilerplate
2A-8	15-Day Letter Form
2A-9	Criminal Investigation Unit Notification Routing Form
2A-10	Case Closure Dereferal Memorandum Boilerplate
2A-11	UST Warning Letter Boilerplate
2A-12	UST Notice of Violation Boilerplate
2A-13	UST Letter of Agreement Boilerplate
2A-14	UST Consent Order Boilerplate
2A-15	UST Executive Compliance Agreement Boilerplate
2A-16	Alternate DMR Notice of Violation Boilerplate

CHAPTER THREE

CLASSIFICATION OF PRIORITY CASES

In all three of the media there are certain enforcement cases that are of such environmental significance that they are treated on a more involved level. These cases are classified as such based upon EPA requirements and guidance. Because of their status, they are tracked by special tracking systems, which are discussed below. Throughout this Manual, these special cases are referred to as "Priority Cases."

I. AIR PROGRAM PRIORITY CASE CLASSIFICATION

On December 22, 1998, EPA established guidance called "Issuance of Policy on the Timely and Appropriate ("T&A") Enforcement Response to High Priority Violations" ("HPVs"). This guidance identifies the highest priority violations for the Air Program, and provides a special tracking system for resolving those suspected violations. DEQ is obligated through its Section 105 Grant commitments to implement the HPV Policy in the Commonwealth. The Department prefers that its staff serve as the lead enforcement agency. Conformity with the HPV Policy, however, does not preclude EPA intervention in any enforcement activity against suspected noncomplying sources, including those that do not meet HPV criteria.

A. HIGH PRIORITY VIOLATIONS CRITERIA

In its Policy, EPA defines "HPVs" as those sources that are environmentally most important and establishes criteria for HPV status. The criteria apply to the pollutant(s) of concern at major sources, (*i.e.*, pollutant for which source is major) except where the criterion itself indicates otherwise (*e.g.*, applies to a synthetic minor source). The determination of what is substantive or substantial shall be part of a case-by-case analysis/decision by EPA and the delegated agency.

The following criteria trigger HPV status:

- Failure to obtain a PSD permit (and/or to install BACT), an NSR permit (and/or to install LAER or obtain offsets) and/or a permit for a major modification of either.
- Violation of an air toxics requirement (*i.e.*, NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions.
- Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR or Title V status (*i.e.*, fails to comply with permit restrictions that limit the source's potential emissions below the appropriate thresholds; refers only to pollutants for which the source is a synthetic minor. It is not necessary for a source's actual emissions to exceed the NSR/PSD/Title V thresholds.).

- Violation of any substantive term of any local, state or federal order, consent decree or administrative order.
- Substantial violation of the source's Title V certification obligations (*e.g.*, failure to submit a certification).
- Substantial violation of the source's obligation to submit a Title V permit application (*i.e.*, failure to submit a permit application within 60 days of the applicable deadline).
- Violations that involve testing, monitoring, record keeping or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits.
- A violation of an allowable emission limit detected during a reference method stack test.
- Clean Air Act violations by chronic or recalcitrant violators. Chronic or recalcitrant violator refers to a source that may stay below the HPV threshold but continually violates requirements to the extent that it is mutually agreed by EPA and the delegated agency that the source should be bumped up into HPV status.
- Substantial violation of Clean Air Act § 112 (r) requirements (for permitting authorities that are not implementing agencies under § 112 (r) program, limited to source's failure to submit Section 112 (r) risk management plan).

B. INSTRUCTIONS FOR PROCESSING A HIGH PRIORITY VIOLATION

1. Inspector's Responsibility

It is the inspector's responsibility to do the following when processing an HPV:

- Know the HPV Policy.
- Know the schedule requirements.
- Initiate activities as necessary to meet the schedule.
- Track source obligations.
- Ensure that the Air Compliance Manager is kept informed of potential schedule problems.
- If, at any time during the process, it becomes apparent that the alleged violation will not be resolved administratively (*e.g.*, through consent order), this information will be conveyed to the Air Compliance Manager as soon as possible.

2. Time Schedule for Processing HPVs

EPA Policy requires the following time schedule for processing HPVs:

Day 0

The clock starts (*i.e.*, day zero) no later than 45 days after the discovering agency first receives information concerning a federally enforceable violation (*e.g.*, date of inspection, stack test or continuous emission monitoring system report). If, during this 45-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data or on the 90th day after the violation was initially discovered. This additional period (up to 45 days) provides sufficient time for agency evaluation of the data to determine if it is a federally enforceable violation.

Day 60

Unless DEQ requests that EPA issue the notice, by Day 60 DEQ shall routinely issue an NOV (if required for SIP sources) or an EPA Finding of Violation ("FOV") (for non-SIP sources) to the source. If DEQ has not done so, EPA's Policy requires it to immediately issue an appropriate notice.

- An EPA-issued NOV or FOV in a State-lead case means EPA still expects the State to resolve the matter, and further EPA action will be required only in the absence of an acceptable prompt resolution by the State.
- The issuing office will transmit copies of NOVs or FOVs it issues to other agencies in whose jurisdiction the source is located. If the alleged violation clearly impacts upon the air quality of an adjacent state, EPA will also transmit a copy of the NOV or FOV to that state as well.
- EPA will also add this source to its list of HPVs for Agency tracking and reporting purposes.

Day 150

If DEQ has the initial lead and the case has not been resolved or addressed by Day 150, EPA and DEQ will consult about the overall case strategy and discuss effective means for expeditiously addressing or resolving the case. Possible strategies could include continued deferral to DEQ, EPA assumption of the case, or continuation of the case in a work-sharing arrangement between EPA and DEQ.

EPA Responsibilities After It Assumes the Lead

If it assumes the lead in a case, EPA will have up to an additional 150 days to (1) get the source into compliance or on a compliance schedule, (2) issue a § 113(a) administrative order (including administrative remedies), (3) issue a § 113(d)

administrative enforcement action, (4) or subject the source to a § 120 action or judicial referral. EPA encourages continued state participation even in situations where EPA takes over the lead. The possibility of a joint action should be considered as an alternative to a unilateral EPA action where feasible.

Day 270 (no lead change) or Day 300 (lead change)

By Day 270 (or Day 300 with lead change) the source shall either be RESOLVED or ADDRESSED, *i.e.*, subject to a legally-enforceable and expeditious administrative or judicial order or be subject to a referral to the Attorney General's Office or the Department of Justice. In some complex cases, more time may be required. If a case will require additional time, DEQ and EPA will discuss a case's complexity as soon as those factors are determined.

3. Emergency Episodes; Construction Without a Valid Permit

With respect to emergency episodes or sources that construct without a valid PSD or Part D permit (where one is required), the time lines delineated above do not apply. In the case of emergency episodes, the seriousness of the violation would normally require expedited action. In the case of a source constructed without a required PSD or Part D permit, options for obtaining relief may be foreclosed by allowing the source to continue to construct and, therefore, expedited action may be essential.

II. WASTE PROGRAM PRIORITY CASE CLASSIFICATION

A. SOLID WASTE PROGRAM

Because of the minimal nature of federal enforcement presence, there is no federal formal classification of suspected noncompliance in the Solid Waste Program. DEQ addresses suspected violations of the Solid Waste Program in the manner set forth in Chapter One.

B. HAZARDOUS WASTE PROGRAM

Because Virginia has been granted EPA authorization, DEQ uses EPA's Hazardous Waste Civil Enforcement Response Policy (Mar. 15, 1996) to classify suspected hazardous waste violations for the purpose of determining a timely and appropriate enforcement response. The March 1996 Policy classifies alleged noncompliers based upon an analysis of the facility's overall compliance with Subtitle C of RCRA – not on an individual violation basis – which includes prior recalcitrant behavior or a history of noncompliance.

The Policy establishes two classifications of violators: Significant Noncompliers ("SNC") and Secondary Violators ("SV"). Examples of these classifications are provided below. In this Manual,

only SNCs are Priority Cases; SVs are not. SVs are addressed here in keeping with EPA's March 16, 1996 Policy and to clarify the distinctions between the two classifications.

1. Inspector's Responsibility

It is the inspector's responsible to do the following when processing a hazardous waste case:

- Know the EPA March 16, 1996 Policy.
- Know the schedule requirements.
- Initiate activities as necessary to meet the schedule.
- Track source obligations.
- Ensure that the appropriate Manager is kept informed of potential schedule problems.
- If, at any time during the process, it becomes apparent that the alleged violation will not be resolved administratively (*e.g.*, through consent order), this information will be conveyed to the appropriate Manager as soon as possible.

2. Significant Noncompliers

SNC Priority Cases are those facilities that:

- have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents;
- are chronic or recalcitrant violators;
- have deviated substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements; or
- for which corrective actions cannot be completed within 90 days of the evaluation date.

The actual or substantial likelihood of exposure should be evaluated using facility specific environmental and exposure information whenever possible. This may include evaluating potential exposure pathways and the mobility and toxicity of the hazardous waste being managed. It should be noted, however, that environmental impact alone is sufficient to cause a facility to be SNC, particularly when the environmental media affected require special protection (*e.g.*, wetlands or sources of underground drinking water). While facilities should be evaluated on a multi-media basis, a facility may be found to be a chronic or recalcitrant violator based solely on prior RCRA violations and behavior.

3. Secondary Violators

SVs – which are not Priority Cases – are suspected violators that do not meet the criteria listed above for SNCs. SVs are typically first time violators and/or violators that pose no actual threat or a low potential threat of exposure to hazardous waste or constituents. A facility classified as an SV should not have a history of recalcitrant or non-compliant conduct. Suspected violations associated with an SV

should be of a nature to permit prompt return to compliance with all applicable rules and regulations within 90 days of the evaluation date.

4. Violation Classification Examples

The following examples are designed to assist in classifying the status of facilities that are suspected of being in violation of applicable federal or Virginia requirements. The following examples are not intended to encompass all potential violation characteristics. The Regional Offices with the assistance of OEC, as needed, make the final determination of an individual facility's designation. The violation classification examples are presented based upon the characteristics associated with the specific facility classifications (SNC and SV).

- Failure to carry out waste analysis for a waste stream (SNC). If subsequent waste analysis indicates that the stream is not a hazardous waste, the appropriate classification is SV.
- Operating without a permit or interim status (SNC).
- Failure to comply with 90 day storage limit by a generator (SV). Significant deviation from the requirement or failure to rectify the violation upon notice elevates facility to SNC.
- Commencing construction prior to permit approval at a new facility or modifications to an existing facility requiring a permit before such construction is commenced (SNC).
- Systematic failure of a generator or transporter to comply with the manifest system or substantial deviation from manifest requirements (SNC). More routine manifest violations of a limited nature may not require SNC designation.
- Failure to satisfy manifest discrepancy reporting requirements (SNC).
- Failure to prevent the unknowing entry or prevent the possibility of unauthorized entry of persons or livestock into the waste management area of the facility. A SNC designation is appropriate when such failure substantially increases the potential for harm to the health of humans or livestock (SNC).
- Failure to properly handle ignitable, reactive, or incompatible wastes (SNC).
- Disposal of hazardous waste by a waste handler in a regulated quantity at a non-regulated treatment, storage, and disposal facility (“TSDF”) (SNC).
- Improper or unpermitted disposal of waste in violation of the land-disposal restrictions (SNC).
- Mixing, solidifying, or otherwise diluting waste to circumvent land-disposal restrictions (SNC).
- Incorrectly certifying a waste for disposal/treatment in violation of the land-disposal restrictions (SNC).
- Failure to submit notifications/certifications as required by land-disposal restrictions (SNC).

- Failure of an owner/operator of a TSDF to have a closure or post closure plan or cost estimates (SNC).
- Failure to maintain a copy of the closure plan or financial assurance documentation onsite at the facility when it is maintained at the corporate headquarters and/or regional corporate office (SV). Absence of documentation or failure to supply documentation upon request would be a SNC designation.
- Minor deviations from the schedule set out for facility closure (SV).
- Major deviations from the schedule set out for facility closure (SNC).
- Failure of the owner/operator to retain a professional engineer to oversee closure activities and certify conformance with the closure plan (SNC).
- Failure to establish or maintain financial assurance for closure and/or post-closure care (SNC).
- Failure to submit a biennial report (SV). A facility's repeated failure to submit the report may be considered recalcitrant behavior and warrant an SNC classification.
- Failure to conduct required inspection or correct hazardous conditions detected during a generator inspection (SNC).
- Failure to follow emergency procedures contained in the response plan which could result in serious harm. Failure to conduct the following types of activities during an emergency would be cause for a SNC designation. Response activities include: activating alarm and/or notifying appropriate emergency officials; reporting findings of spills outside a facility; containing hazardous waste; monitoring any shut-down operations; properly treating, storing, and disposing of the spill materials; and cleaning up completely after an accident (SNC).
- Storage of hazardous waste in a container which is in poor condition, substantially increasing exposure or potential exposure to human health and the environment (SNC).
- A general failure to follow drum labeling requirements or a lack of knowledge of the contents of the drum (SNC).
- Failure to date containers/tanks with an accumulation date. (SNC) In an instance of a first violation, if records document an accumulation date, the facility should get an SV designation.
- Deviation from or failure to perform in accordance with a required compliance schedule (SNC).

5. Time Schedule for Processing SNCs/SVs

Appropriate enforcement actions are divided into two categories, tied to the two levels of violations. An informal enforcement response is the minimally appropriate enforcement response for all

Secondary Violators. Formal enforcement actions are the minimally appropriate enforcement response for all Significant Noncompliers.

An informal enforcement response typically consists of a Warning Letter containing a recitation of the violations and a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits, and statutes within 90 days. A facility that fails to return to compliance in accordance with the informal action should be reclassified as a SNC and a new evaluation date established.

A formal enforcement response must mandate compliance and initiate a civil, criminal, or administrative process that results in an enforceable agreement or order. The formal enforcement response should also seek injunctive relief that ensures the non-compliant facility expeditiously returns to full physical compliance.

Resolution of informal and formal enforcement actions must occur within the restraints of the following timeline.

Day 0 C Evaluation Date

The evaluation date is defined as the first day of any inspection or record review during which a violation is identified, regardless of the duration of the inspection or the stage in the inspection at which the violation is identified. For violations detected through some method other than record reviews or inspection, the evaluation date will be the date upon which the information (e.g., self-reporting violators) becomes available.

If a facility is reclassified as a SNC because of a violation of an informal enforcement response, for the purposes of timeline tracking, the new evaluation date will be considered the first day of discovery of non-compliance with the compliance schedule established through the informal enforcement response.

Day 90

Typically, informal enforcement responses are initiated much sooner than 90 days after the Evaluation Date. In all cases, however, this determination must be made and the informal response must be issued within 90 days of the evaluation date.

Formal enforcement responses must be initiated by the issuance of a NOV by no later than 90 days after the evaluation date.

Day 180

Informal enforcement responses must result in a return to compliance by day 180. If not, the facility shall be reclassified as a SNC and a second evaluation date established. The second evaluation date will be considered the first day of discovery of noncompliance with the compliance schedule established by the informal enforcement

response but in no case shall the new evaluation date be established later than 180 days following the initial evaluation date.

For formal enforcement responses, where appropriate, a Unilateral Order (1186 Order) shall be issued within 180 days of the evaluation date.

Day 210

For cases which are determined appropriate for judicial action, the case must be referred to the Attorney General's Office within 210 days of the evaluation date.

Day 300

For cases deemed appropriate for an administrative enforcement response, a Consent Order (CO), or in cases involving State Facilities, an Executive Compliance Agreement (ECA) must be entered into within 300 days of the evaluation date.

III. WATER PROGRAM PRIORITY CASE CLASSIFICATION

By policy, EPA has established its water enforcement priorities as the following: (a) to ensure that adverse impacts on human health and the environment are prevented and (b) to assure a level playing field with penalties which recapture the economic benefits of noncompliance. With these priorities in mind, EPA oversees the Water Program by tracking all Major permittees and Minor permittees of particular interest. Pursuant to EPA's "Timely and Appropriate" ("T&A") policy, noncompliance should be addressed preferably within three months. EPA acknowledges, however, that six to eight months may be necessary to finalize the action where complex injunctive relief is required.

DEQ is obligated through its Section 106 Grant commitments to implement the T&A Guidance in the Commonwealth. While the Department prefers to serve as the lead enforcement agency, conformance with the T&A Guidance does not preclude EPA intervention in any enforcement activity against suspected noncomplying sources, including those which do not meet the Significant Noncompliance criteria.

EPA guidance states:

> [A] rebuttable presumption will exist that EPA will move independently to address special emphasis violators if it appears that the State is unable to appropriately address the violation (including the collection of appropriate penalties....). EPA may move independently to address significant violators if it appears that the State is unable to timely resolve the significant violator, or if EPA discovers the State was aware of the violation but failed to report the violation to EPA as required.

A. SIGNIFICANT NONCOMPLIANCE

EPA has developed criteria for acting upon violations at Major facilities that define such violations as SNC. SNC violations are a subset of those instances of noncompliance which are to be reported as "reportable noncompliance by a major facility" under § 123.45, Title 40, Code of Federal Regulations. EPA defines "Reportable Noncompliance by a Major Facility" as those violations that can result in the facility being listed as SNC on the QNCR. See Chapter Two regarding EPA reporting.

According to EPA guidance for Timely and Appropriate enforcement actions, reportable noncompliance found on Major Facilities are "Significant Noncompliance" if they meet one or more of the following criteria:

- Missing a major compliance schedule milestone in a permit (start construction, end construction, meet final limits) by 90 days or more.
- Chronic Review Criteria: Four monthly average effluent permit violations (same pipe, same parameter) of ANY magnitude in a six month period.
- Technical Review Criteria: Two monthly average effluent permit violations (same pipe, same parameter) in two successive quarters (1.4 times the limit for a conventional pollutant[1] or 1.2 times the limit for a toxic pollutant[2]).
- Effluent violations of non-monthly average limits per Technical and Chronic Review Criteria (monthly average must also be violated to some degree).
- Failure to provide a compliance schedule report for final compliance from a permit or order schedule.
- Failure to provide a discharge monitoring report (30 days past due).
- Failure to implement an approved pretreatment program (i.e., failure to issue permits to industrial users [IUs], failure to inspect or sample IUs, failure to enforce against violating IUs).
- Any violation of a judicial decree.
- Any violation or pattern of violations which are appropriate for SNC designation (chronic overflows, chronic bypasses, fishkill, etc.) based on human health or environmental impact.
- Any violations of an interim limit in a consent or judicial order.

[1]SNC conventional pollutants: Oxygen Demand (including BOD, COD, TOD, TOC), Solids (including TSS, TDS), Nutrients (including Inorganic Phosphorus Compounds, Inorganic Nitrogen Compounds), Detergents, and Oils (including MBAs, NTA, oil and grease, other detergents or algicides), Minerals (calcium, chloride, fluoride, magnesium, sodium, potassium, sulfur, sulfate, total alkalinity, total hardness, other minerals), and Metals (aluminum, cobalt, iron and vanadium).

[2]SNC Toxic Pollutants: Metals (all forms, including those not specifically listed as conventional pollutants), Inorganic (cyanide, total residual chlorine), Organics (all Organics, excluding those specifically listed as conventional pollutants).

- Missing a major compliance schedule milestone in an order by 30 days or more.

B. SPECIAL EMPHASIS VIOLATORS

In addition to SNC, there are other cases which need to be brought into compliance as expeditiously as possible. These special concern violators are termed "Special Emphasis Violators" and are defined by EPA to be:

- In programs not delegated to the state (*e.g.*, the sludge program), all SNC violations, including SNC-type violations of minor facilities.
- Any violation that impacts or has the potential to impact human health or the environment (majors or minors).
- Any violations uncovered as a result of investigation of citizen complaints or citizen suit notices under Section 505 of the Clean Water Act (majors or minors).
- Any violations referred to EPA for enforcement by DEQ.
- Instances where the DEQ has failed to recoup significant economic benefit (majors and minors).

C. EXCEPTIONS LIST

EPA's T&A policy states that SNC violations be addressed within one quarter of their occurrence. Rigid compliance with this policy, however, may result in hasty action that does not lead to a desired long-term solution. As a result, EPA developed an "Exceptions List" process.

The "Exceptions List" is a report which identifies Major water program permittees that are in SNC for two consecutive quarters. Any Major permittee listed on the QNCR for two consecutive quarters for the same instance of SNC (*e.g.*, same pipe, same parameter for effluent violations; same milestone for schedule violations; same report for reporting violations; and same requirement for "other" violations) must be listed on the Exceptions List unless the facility was addressed with a formal enforcement action prior to the completion date of the second QNCR.

DEQ's goal is to address alleged violations before they become SNC.

D. COMPLIANCE AUDITING SYSTEM

The Water Compliance Auditing System ("CAS") catalogues different violations by subjecting them to point assessment criteria. The point assessment criteria are uniformly applied with higher values given to violations of greater environmental consequence. Chronic violations also receive higher point assessments. The Point Assessment Criteria follows at the end of this Chapter.

Each violation of enforceable documents, state laws, and state regulations may receive points or fractions of points. Where multiple point values are shown in the Point Assessment Criteria (*e.g.*, .5, .5,

1, 2), the first value (.5) is assigned for the first violation in a given six-month period, the second value (.5) is assigned for the second violation in the same period, the third value (1) is assigned for the third violation in the same period, etc. Where the same violation is continuing, such as not meeting a compliance schedule date, the first value is generally assigned in the same month as the missed due date, and succeeding values assigned in one-month periods after the first. For effluent violations this applies only to the same parameter at the same pipe. For schedule milestones and report due dates, each month overdue results in additional or increased point assessment.

The points will be accumulated over a six-month period. Points obtained in the first month of any six-month period shall be deleted at the beginning of the next month following that six-month period. Facilities that are required to submit DMR's less frequently than once per month, but more frequently than once per year, shall be evaluated at the end of each reporting period to determine accumulated violation points. The graduated-point scale will be applied to these DMR's the same as for monthly reports, except on rolling periods consisting of six reports. DMR's will be reviewed, and data entered into the record, for facilities reporting only once per year. Points will be assigned for DMR violations, but the graduated point escalation system will not be used. Only the minimum points will be assigned for each violation, but points will also accrue for other violations as appropriate, and enforcement referral will occur if four points are received in a six-month period.

For non-VPDES facilities which are required to submit monitoring reports, tracking and reported violations will be assessed according to guidelines specified for VPDES permit violations insofar as possible. Tracking of their reports is necessary to determine potential environmental impact and subsequent remedial and enforcement action.

Those violators which accumulate less than four points shall be evaluated by the regional office and appropriate compliance assistance shall be offered. Generally, violators – including Majors – that accumulate at least one point but no more than 3.9 points during any six-month period shall receive a Warning Letter. All violators who receive four or more points in a six-month period shall be issued a Notice of Violation.

For the purpose of managing point assessments in the enforcement referral process, the following will apply :

- Majors - In a given month, the total points that can accrue for a Major facility will be the greater of the highest number of points for a single violation, or two points.
- Minors - In a given month, the total points that can accrue for a Minor facility will be the greater of the highest number of points for a single violation, or one point.

Points may be excused by the Compliance and Enforcement Manager, for infrequent violations and noncompliance where the permittee/owner has demonstrated to the satisfaction of the staff that such occurrence or noncompliance was due to an upset as defined by the Board's Permit Regulation (for violations of technology-based limits only), was not due to a lack of proper operation and maintenance, or was caused by earthquake, flood, or other acts of God.

When a permit is modified to reflect a change in ownership, all accumulated points are automatically voided. However, this voidance of points will not apply if the previous owner has already

undergone enforcement action or if the modification only reflects a name change or an attempt to hide behind a parent corporation.

Once an Owner has signed a Consent Order and DEQ has received the original signed document, new NOV's will no longer be issued for violations addressed by the order. This applies to past violations for which NOV's have not been issued yet and for future violations. However, points for past violations will remain on the books, and points for future violations will accrue until the enforcement action becomes effective. Issuance of an Emergency Special Order does not qualify for voidance of points. In the case of Special Orders issued after a hearing, points shall not be voided and shall continue to accrue for the original violation. Issuance of NOV's shall stop, however, as long as there is compliance with the Special Order.

Where a facility is under an enforcement action to eliminate certain violations and is demonstrating satisfactory progress under the action, points may be excused by the Compliance and Enforcement Manager for the violations the enforcement action was designed to correct.

POINT ASSESSMENT CRITERIA

Points assessed using these Point Assessment Criteria are used as a management-ranking tool to determine the best use of costly resources. Points are assigned when there is evidence that a violation has occurred, but the assignment of points and/or issuance of Warning Letters (WLs) (issued between cumulative, rounded point assessments of 1 and 3) or Notices of Violation (NOVs) (issued when point assessment reaches 4 cumulative, rounded points) are neither agency determinations (i.e., case decisions) nor adjudications. The purpose of the WL and the NOV is to advise that the Board may consider taking or seeking action, and that the facts therein could provide a basis for civil proceedings under Code '' 62.1-44.15(8), 62.1-44.23, 62.1-44.32(a), 62.1-44.34:20 and 10.1-1186(10), or others. Further evaluations are made to determine if and when a violation has occurred and that an enforcement action should be initiated.

VIOLATION DESCRIPTION	POINTS ASSESSED
1) PERMIT VIOLATIONS	
a) VPDES (including General Permits)	
i) Effluent Limits	
(1) Toxic Parameters (Except Cl_2 and ammonia)	
(a) Value equal or greater than 1.2 x Limit	
Major	2
Minor	1
(b) Value less than 1.2 x Limit	
Major	.5, .5, 1, 2
Minor	.2, .2, .5, 1
(c) WET	2
(2) Nontoxic Parameters (including ammonia)	
(a) Value equal or greater than 1.4 x Limit	
Major	2
Minor	1
(b) Value less than 1.4 x Limit	
Major	.5, .5, 1, 2
Minor	.2, .2, .5, 1
(3) Dissolved Oxygen, pH, Temperature, All Exceptions, Except Cl_2 (Major and minor)	
(a) Value less or equal to 0.8 x minimum limit	.5, .5, 1, 2
(b) Value greater or equal to 1.2 x maximum limit	.5, .5, 1, 2
(c) Value less than 1.2 x maximum limit	.2, .2, .5, 1
(d) Value greater than 0.8 x minimum limit	.2, .2, .5, 1
(4) Chlorine	
(a) $C1_2$-Inst. Resid. Tech. Max and Inst. Min. Tech Limit (Parameters 166 and 213)	
Major	1
Minor	.5
(b) All Other Cl_2 Including Exceptions (Major & Minor)	
(i) Value less than or equal to 0.8 x minimum limit	.5, .5, 1, 2
(ii) Value greater or equal to 1.2 x maximum limit	.5, .5, 1, 2
(iii) Value less than 1.2 x maximum limit	.2, .2, .5, 1
(iv) Value greater than 0.8 x minimum limit	.2, .2, .5, 1
(5) Quarterly Reporting	
Major	1, 1, 2
Minor	1
ii) Pretreatment Violations	
Major	1, 1, 2

Minor 1

iii) Toxics Monitoring Program (Major and minor)

(1) Failure to report under TMP/TRE 1, 1, 2

(2) Inadequate reporting under TMP/TRE, 1st submittal 1, 1, 2

(3) Inadequate reporting under TMP/TRE, subsequent submittals 1, 1, 2

iv) Unsatisfactory Inspection (Major and minor)

(1) Overall unsatisfactory rating 5, 1, 1, 2

(2) Overall unsatisfactory rating with evidence of falsification 4

v) Bypasses and Overflows (through permanent outfalls, points assessed per discharge, per day) (Major and minor)

(1) Unreported 2

(2) Reported ..... .2, .2, .5, 1

b) VPDES and VPA

i) Compliance schedules/due dates

Major 1, 1, 2

Minor 1, 1, 2

ii) Late DMR/monitoring report (Major and minor)
(Received after 10th of month, but not if postmarked by U. S. Post Office by 10th of month or documented received on 10th of month by commercial courier for delivery) 5, 1

iii) No DMR/monitoring report (Not received in month due) and
deficient DMR/monitoring report (Omissions or errors so great as to prohibit a determination of compliance or 25 percent of values missing)

Major 2

Minor 1

iv) Incomplete DMR (Normally less than 25 per cent of required parameter values missing)
(Maximum points per DMR/monitoring report) 1

v) Improper DMR/monitoring report (Major and minor) (.2 total points per DMR/monitoring report to be assessed regardless of improper items) 2

Examples of Improper DMR/Monitoring Report Violations:

- *No signature, no date, or no telephone number.*
- *Number(s) and/or decimal point illegible.*
- *Typographical or data entry error.*
- *DMR submitted on outdated form.*
- *Monitoring period not entered.*
- *Sample type or sample frequency not complete or incorrect.*
- *Letter of Explanation for violations not received.*
- *Letter of Explanation for violations not adequate.*

vi) Application Process Violations (Major/minor/no permit)

(1) Failure to (Re)Apply in Timely Manner 1, 1, 2

(2) Improper or incomplete application/reapplication 1, 1, 2

(3) Construction/modification of facilities without application (New or existing) 1, 1, 2

vii) Minor violations (Other than any of above)

(1) Violation without adverse environmental impact 5

(2) Failure to Correct Minor No-Impact Violation 1

(Examples: failure to submit O/M manual; failure to operate in accordance with O/M manual; violation of CTO condition)

c) VPA and Land Application

i) Adverse environmental impact, or presenting an imminent and substantial danger 4

ii) Violation which causes discharge to state waters 1, 3

iii) Violation With No Discharge to State Waters 5

iv) Failure to submit complete, original application 1, 1, 2

v) Application Process Violations

(1) Failure to (Re)Apply in Timely Manner 1, 1, 2

(2) Improper or incomplete application/reapplication 1, 1, 2

(3) Construction/modification of facilities without application (New or existing) 1, 1, 2

d) Virginia Water Protection Permit Program (VWPP)

i) Any violation causing major adverse environmental impact, including but not limited to fish kills or loss of other beneficial uses 4

ii) Improper or incomplete application 1, 1, 2

iii) Unpermitted activity, without major adverse environmental impact 2

iv) Noncompliance with water protection permit without major adverse environmental impact 2

v) All other violations 1, 1, 2

e) Groundwater withdrawal permit violations

i) Violation of annual withdrawal limit 2

ii) Violation of monthly withdrawal limit 1

iii) Withdrawal without permit or certificate 1

iv) Violation of permit or certificate conditions 1

v) Failure to comply with/correct any standard or special conditions other than limits 1

vi) Failure to mitigate adverse impacts of withdrawal as required by mitigation plan 4

2) ENFORCEMENT ACTION VIOLATIONS

a) Judicial actions, all violations (Major and minor) 4

b) Administrative actions

i) Special Orders

(1) Failure to pay civil charge in accordance with consent order (major and minor) 4

(2) Compliance schedules/due dates (except routine progress reports)

(a) Majors 2

(b) Minors 1, 1, 2

(3) Progress reports (Not including study, sample data submittal) (Major and minor) 1

(4) Effluent limits less stringent than permit

(a) Major 4

(b) Minor 2

(5) Effluent limits equal to or more stringent than permit (same as points for permit violations)

3) PETROLEUM STATUTE VIOLATIONS

a) Underground oil storage tank (Article 9: UST and LUST) program violations

i) No adverse environmental impact ..... .5, .5, 1

ii) Potential adverse environmental impact 1

iii) Adverse environmental impact or presenting an imminent and substantial danger 4

iv) Failure to report a release or suspected release 4

b) Aboveground 011 storage tank (Article 11: AST and LAST) violations

i) Failure to submit Contingency Plan, or operation without approved Contingency Plan 1

ii) Failure to respond in 30 days after violator is notified by OSRR of inadequate Contingency Plan (1st point on 1st day late) 1, 1, 2

iii) Failure to demonstrate financial responsibility 1. 1, 2

iv) Failure to maintain on-site facility records 1, 1, 2

v) Failure to operate in accordance with approved Contingency Plan 1, 1, 2

vi) Reportable oil spill with no approved Contingency Plan, or inadequate response to oil spill 4

vii) Failure to remediate 2, 2

c) Tank Vessels (Article 11)

i) All violations 4

d) Oil Discharge Violations (Article 11)

i) Discharge or Release of Oil Resulting in Environmental Damage or Loss of Beneficial Uses (If there is a clear responsible party) 4

ii) Failure to immediately report discharge of oil that reaches, or that may reasonably be expected to reach, state waters, state lands or storm drains 4

4) OTHER VIOLATIONS

a) Spills into state waters and discharge to state waters not authorized by permit

i) Adverse environmental impact, or presenting an imminent and substantial danger 4
ii) All other spills
(1) Not Reported 4
(2) Reported 1

b) Refusal to reimburse for collectible cost recovery 2, 2
c) Violations of regulations and laws not stated above ..... Case by Case

5) AGGRAVATING FACTORS (not withstanding the above, any violation with following characteristics)
a) Adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger 4
b) Potential for adverse impact or loss of beneficial use 2
c) Violations resulting in exceedences of water quality standards violations 2
d) Suspected falsification 4
e) Suspected willful violation 4
f) Violation due to clear indifference 4
g) Any violation when the owner or operator is insolvent or bankrupt; where the facility is, or is about to be, abandoned; or when ownership of the facility is or is about to be transferred. 4
h) Site access violations
i) Failure to provide reasonable access otherwise required by statute or permit to any facilities where there is adverse environmental impact or an imminent and substantial danger 4
ii) Other site access violations 1, 3

NOTES:

- "Adverse Environmental Impact" includes, but is not limited to, fish kills, loss of drinking water supply, or loss of other beneficial uses. Any allegation of adverse environmental impact due to spills, bypasses, unpermitted discharges, and other violations of state law and regulations shall be reported to the enforcement staff with documentation that shall conclude that either there was a resulting adverse environmental impact or there was no adverse environmental impact.
- "Industrial Major Facility" - Facilities which have been defined as significant on the basis of permitted effluent characteristics and receiving stream quality and which are redefined yearly by agreement between the Board and EPA.
- "Industrial Minor Facility" - Facility not on EPA's list of Major Industrial facilities.
- "Municipal Major Facility" - Any municipal treatment facilities with flow equal to or greater than 1.0 MGD, and which are redefined yearly by agreement between the Board and EPA.
- "Municipal Minor Facility" - Any municipal treatment facility with flow less than 1.0 MGD.

CHAPTER FOUR

CIVIL CHARGE CALCULATIONS

This Chapter sets forth how the Department generally expects to exercise its enforcement discretion in determining an appropriate civil charge it will be willing to settle a case under the Air, Waste, and Water Laws. Civil charges are used for deterrence purposes and to remove the economic benefit of non-compliance. Before calculating a civil charge, the staff must first determine whether the alleged violation warrants a civil charge.

The civil charge calculations set forth here are also used to calculate penalties for Code § 10.1-1186 Special Order Proceedings for all three media. The development of the penalty amount to plead in a judicial complaint is developed independently of these procedures and thus is not addressed here.

I. THE AIR PROGRAM

The Virginia Air Pollution Control Law ("Air Law") at § 10.1-1316(C) provides for the inclusion of negotiated civil charges in Consent Orders with a source for violations of the Air Law and Regulations. The maximum limit for a civil charge is $25,000 for each violation, with each day being a separate violation.

The following procedures address the calculation of civil charges under the Air Law and Regulations. To establish a civil charge, the enforcement staff must first determine if the violation is a "Serious," "Moderate," or "Marginal" violation. This classification is then used in the Civil Charge Calculation Worksheet ("Worksheet") to determine the civil charge amount.

A. SERIOUS, MODERATE, AND MARGINAL VIOLATIONS

The terms "Serious," "Moderate," and "Marginal" as they appear on the Worksheet are intended to reflect the relative severity of the noncompliance that led to the civil charge. The severity of the violation is reflected in the amount of the standard civil charges provided on the Worksheet. The sum of these standard civil charges and those civil charges calculated specifically for the noncompliance situation is the civil charge assessed to the source. The classification determines the civil charge assessed for each category of violations *with the exception of the economic benefit calculation*.

The following sections identify standardized situations for each of the violation severity levels. Ultimately, it is the professional judgement of the regional personnel that will be the determining factor on what level of severity is assigned to each violation. The table is intended to provide examples of minimum violations for each category. Marginal and moderate violations can be upgraded based on site-specific information gathered by regional personnel. Adherence to these procedures ensures consistency among the regions and DEQ adherence to EPA requirements.

1. Serious Violations

The following are considered serious violations:

- No PSD permit
- No permit for Major Sources
- NESHAP standards violations
- Substantive NSPS standards violations at Major Point Sources
- A Major Source violating Virginia Air Regulations
- Refusal to stack test and/or submit stack test report
- Violations which cause actual documented NAAQS violations
- SAAC violations
- Throughput violations triggering PSD review
- Deliberately bypassing control equipment for Major Point Source
- Not maintaining control equipment for Major Point Source in a manner consistent with good air pollution control practice
- Failure to install, maintain, and operate federally required CEM equipment

2. Moderate Violations

The following are considered moderate violations:

- NSPS standards violations at SM Point Sources
- An SM/B Source violating Virginia Air Regulations
- Deliberately bypassing control equipment for SM Point Source
- Not maintaining control equipment for SM Point Source in a manner consistent with good air pollution control practice

3. Marginal Violations

The following are considered marginal violations:

- No permit for a B Point Source
- NSPS standards violations at B Point Sources
- Most reporting violations (including NESHAP reporting requirements)
- Throughput violation not triggering PSD review
- Deliberately bypassing control equipment for B Point Source

- Not maintaining B Point Source control equipment in a manner consistent with good air pollution control practice

B. CIVIL CHARGE CALCULATION

In providing for civil charges, the Code states that the size of the owner's business, the severity of the economic impact of the civil charge on the business, and the seriousness of the violation shall be considered. To address these requirements, the enforcement staff should incorporate the following in the civil charges: the economic benefit derived through noncompliance and an amount reflective of the severity of the violation. When developing a civil charge, due consideration should be given to the responses and actions of the source.

Civil charges are calculated using the "Civil Charge Calculation Worksheet" ("Worksheet"), which is found at the end of this section on the Air Program. The categories of violations are the numbered items that make up the Worksheet, which are further described below. When using the Worksheet to address multiple violations discovered during the same compliance determinant activity, charges are to be calculated for each violation, independently, with the exception of items 8 and 11, and then combined to provide the total proposed civil charge.

1. Permit or Regulatory Violations

This category is general in nature and is intended to establish a minimum charge for all violations of regulatory or permit requirements. This charge is in addition to any which may be applicable under item 4 of the Worksheet for the same violation. If the source is being assessed for violation of a PSD, NESHAP, or NSPS requirement, the applicable charges in item 1 are to be multiplied by 2.

To address this issue, a series of questions are provided on the Worksheet as follows:

a. **Is a permit required?** This civil charge is applicable to situations of construction/modification/reconstruction without a new source permit and to the failure to obtain an operating permit

b. **Is the source operating without the required permit?** This civil charge is applicable to situations of construction/modification/reconstruction without a new source permit where the source has begun operation of the source or point source affected by the permit applicability determination. This civil charge is assessed in addition to item 1.a.

c. **Is a permit/regulation violated?** This civil charge applies to violations of permit conditions and requirements of the Air Regulations.

2. Consent Order Violations

a. **Is a Consent Order condition violated?** This civil charge is assessed if the source has violated requirements of a Consent Order and is in addition to those civil charges that may be applicable in items 1, 3, or 4 of the Worksheet.

3. Pollution Control Equipment Violations

This civil charge is assessed for the failure to install or properly operate and maintain air pollution control equipment. The pertinent questions on the Worksheet are as follows:

a. **Is equipment installed?** In other words, are appropriate air pollution controls present? This civil charge is applicable to, but not limited to, situations of:

- Failure to install air pollution control equipment specifically required by permit or regulation, or removal of such equipment;
- Failure to install equipment necessary to meet BACT or LAER (in situations of construction/modification/reconstruction without a permit) as may be determined through the permit review process; or
- Failure to install control equipment capable of meeting emissions limits established by permit or regulations.

b. **If installed, is equipment operating properly?** In other words, are the air pollution controls operating properly? This civil charge applies to situations where the source neglects to operate the equipment or is not operating or maintaining the equipment adequately.

Note that assessment of item 3 civil charges is not limited to traditional end-of-the-pipe equipment but is also applicable to production equipment, particularly if this equipment has been identified as BACT/RACT/LAER. Also, careful consideration must be given to the assessment of this civil charge when assessed in combination with item 4 of the Worksheet. A situation could exist where the pollution controls are maintained and operated properly but an emission violation still occurs. It is not appropriate in this situation to assess a civil charge for improperly operated pollution control equipment, just the emissions violation.

4. Emission/Monitoring Violations

Located on the Worksheet are four questions related to emission/monitoring violations. The amount of the civil charge associated with the individual questions is based on the percentage over the emission limit for the emission violations and the type of violation for the CEM violations. Table 1 establishes the civil charge based on the percentage over emission limit and the point source classification.

a. **Are there visible emission violations?** See Table 1.

b. **Are there emission standard violations?** See Table 1.

c. **Are there CEM violations?** Situations assessed under this category include other types of compliance assurance tracking/reporting, *i.e.* fuel certifications. CEM violations include:

- ***Continual Late Submittal of EER or Other Periodic Compliance Assurance Report.*** Add $500 to base amount on Worksheet. Ten days will be allotted to the source to submit the EER after notice of the violation. Another $200 per day will be charged for every day after the ten-day grace period. The civil charge under this category is calculated on an emissions unit basis, *i.e*, if the source must submit a quarterly report for three emissions units and two were late, the civil charge would be $1,000 with $400 added each day after the 10-day grace period.

  This civil charge is assessed commencing with the second consecutive late submittal of a required periodic compliance assurance report (*i.e.*, excess emissions report, monitoring system performance report, Data Assessment Report, fuel certification report, emissions report, etc). Reporting requirements include those found in §§ 9 VAC 5-40-50(C) and 9 VAC 5-50-50(C) of the Regulations, Subpart A (and other applicable Subparts) of NSPS, Appendix F of NSPS, consent orders, or permits.

- ***Failure to Perform Required Audits.*** Section 9 VAC 5-50-410 of the Regulations incorporates by reference those subparts of 40 CFR Part 60 that incorporate audit requirements. In addition, § 9 VAC 5-40-1780(D) of the Regulations requires audits be performed by those facilities subject to Rule 4-13. Add $1,500 to base amount in Worksheet. Two weeks will be allotted to the source to perform the audit. An additional $200 per day will be charged for every day past the two week grace period. The civil charge under this category is calculated on a monthly basis, *i.e.*, if the source must conduct a quarterly audit on three individual monitoring systems (excluding redundant back-up systems) and two were late, the civil charge would be $3,000 with $400 added each day after the ten-day grace period.

- ***Excessive Downtime on CEM.*** Section 9 VAC 5-50-410 of the Regulations incorporates by reference those subparts of 40 CFR Part 60 which include monitor availability requirements. In addition, § 9 VAC 5-40-1780(D) of the Regulations establishes monitor availability requirements for those facilities subject to Rule 4-13. Add $2,000 to base amount on Worksheet for each monitoring system which does not meet the required monitor availability.

d. **Are there toxic pollutant violations?** This civil charge is assessed to emissions and monitoring violations involving a toxic pollutant. A toxic pollutant is defined in the Regulations as "any air pollutant for which no ambient air quality standard has been established." The staff is reminded that, for "existing sources," the Regulations establish significant ambient air concentration "guidelines" for toxic pollutants. If the existing source is found to be in excess of a guideline, the Regulations provide specific alternatives to address the exceedence. Therefore, an existing source is not considered to be a toxic pollutant violator until or unless DEQ has notified it of the exceedence and the source has failed to respond as specified in § 9 VAC 5-40-220.

Where a violation involves exceedence of a permit limit for a toxic pollutant, a charge should be assessed for both the emission violation and the toxic pollutant.

5. Sensitivity of the Environment

This category focuses on the geographic location of the violation. Civil charges associated with this category are dependent on the nonattainment/attainment status or the PSD area classification and the classification of the violation. The sensitivity of the environment charge applies only to emission standards violations or to work practice or technology standards that serve as emission standards. When a violation occurs in a nonattainment area, the nonattainment charge applies only for violations involving pollutants or pollutant precursors for which the area is designated nonattainment. The description of the nonattainment areas and the PSD classifications are provided in the Regulations.

6. Preliminary Civil Charge Subtotal

Sum all assessed charges in items 1 through 5.

7. Length of Time Factor

The longer a violation continues uncorrected, the greater the potential for harm to air quality. The Worksheet addresses this consideration in the category labeled "Length of Time Factor." The charge is developed by multiplying the number of days the violation occurred by 0.274. The result of this calculation is the Percent (%) Increase Factor. This factor must be divided by 100 to obtain the decimal expression, which is then multiplied with the preliminary subtotal to obtain the additional civil charge. The time span (expressed in days) used to calculate the charge begins on the day, based on documented evidence, the violation began for emission violations and the day of discovery of the violation for administrative violations. The time span ends on the date the source agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the charge(s) was (were) assessed. For situations of construction without a permit, the time span ends when the source submits a *complete* permit application for the affected process or equipment.

The following is an example of how to calculate a "length of time" civil charge:

- ***Calculate the length of time in days that the noncompliance existed.*** For example, 200 days elapsed between the beginning day of the noncompliance and the date the source agreed in principle to a set of corrective actions necessary to return to a state of compliance.
- ***Multiply the number of days by 0.274.*** Take 200 and multiply it by 0.274 to get 54.8. You can round this up to whole numbers to get 55.
- ***Divide this number by 100. This yields the Length of Time Factor.*** 55 divided by 100 yields 0.55.

- ***Multiply the base amount of the civil charge calculated on the Worksheet by the Length of Time Factor.*** Assume for this example that the base amount is $1,000. 1,000 times 0.55 yields $550.
- ***Enter the calculated amount*** into the entry block in item 7 on the Worksheet.

8. Compliance History

The staff considers prior enforcement activities of the Air Law and Regulations in adjusting the civil charge based on the source's compliance history. Prior enforcement activities include any act or omission resulting in an enforcement response, as described in Chapter Two of this Manual. Warning Letters and NOVs that are not pursued would not be considered. This factor may be used to increase - but not decrease - a charge. Evidence of an excellent compliance history cannot be used as justification for reducing a civil charge on a current and unrelated violation. See Table 2.

9. Extended Compliance

"Extended compliance" means extending the date by which the source is required to comply with any compliance date(s). The extended compliance civil charge is intended to apply to situations where the proposed schedule is based upon limitations such as a reasonable construction or equipment delivery schedule. Compliance delays proposed for monetary considerations or for the sake of convenience (*i.e.*, to coordinate equipment installation with the routine annual maintenance shutdown) should only be accepted if the source demonstrates that the associated financial burden is beyond their "ability to pay."

If the source is proposing a schedule that will extend the compliance schedule, a calculated charge for such an extension is appropriate. The consent order shall include a schedule detailing important interim dates and the final date by which compliance will be achieved.

Federal Regulations list specific procedures for processing *Delayed Compliance Orders*. EPA maintains the authority to disapprove any DEQ approved Delayed Compliance Orders subject to the public participation guidelines described in 40 CFR §65.04. All proposed Delayed Compliance Orders shall be transmitted to the Central Office for review prior to entering into a consent order with that source.

If the source is proposing a schedule that will extend a compliance date, there will be a commensurate impact on air quality. A calculated charge for such an extension is appropriate; consequently, when a consent order includes a provision for such a schedule, the amount calculated for items 1-7 should be increased according to length of the extended compliance. Calculate the length of the extension, in months, and multiply this number by 2.78. This gives the percent increase due to the extended compliance. For compliance schedules of less than one month (30 days), calculation of an extended compliance charge is not necessary. Partial months (as determined on 30-day increments) will be assessed as a full month when calculating the extended compliance charge.

The following is an example of how to calculate an "extended compliance" civil charge:

- ***Calculate the length of time, in months (on a 30-day basis), compliance will be extended by execution of the order.*** For example, the schedule described in the consent order indicates a six-month (180 day) delay before compliance will be achieved.
- ***Multiply the number of months by 2.78.*** Take 6 and multiply it by 2.78 to get 16.68. You can round this up to whole numbers to get 17.
- ***Divide this number by 100. This yields the Extended Compliance Factor.*** 17 divided by 100 yields 0.17.
- ***Multiply the base amount of the civil charge calculated on the Worksheet by the Extended Compliance Factor.*** Continuing with this example, the base amount is $1,000. $1,000 times 0.17 yields $170.
- ***Write the calculated charge into the entry block in item 9 on the Worksheet.***

10. Economic Benefit of Noncompliance

Section 113(e) of the federal Clean Air Act states, in part, that in assessing civil penalties the "economic benefit of noncompliance" shall be taken into consideration. The reason for applying this factor in a civil charge is to ensure the charge acts as a deterrent to noncompliance. By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source accrues by avoiding or delaying costs necessary to achieve compliance.

The existence of a significant economic benefit gained from noncompliance must be evaluated on a case-by-case basis. The inspector must use professional judgement when making the preliminary determination that an economic benefit exists. When there exists an indication of an economic benefit based on delayed or avoided costs, the staff shall estimate the value of the economic benefit and include this amount in the proposed civil charge.

a. Delayed Versus Avoided Costs

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure that will not be made due to noncompliance.

- Examples of delayed costs include, but are not limited to: failure to install equipment needed to meet emission control standards; failure to effect process changes needed to reduce pollution; failure to test where the test still must be performed; and failure to install required monitoring equipment.
- Examples of avoided costs include, but are not limited to: disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of staff; failure to adequately train staff; failure to establish or follow precautionary methods required by

regulations or permits; removal of pollution equipment resulting in process, operational or maintenance savings; disconnecting or failing to properly operate and maintain required monitoring equipment; and operation and maintenance of equipment that the violator failed to install.

b. Adjustments to the Calculated Economic Benefit

The inspector may have insight into conditions that affect the amount of the calculated economic benefit. The regional staff should describe:

- **Conditions that indicate economic benefit is insignificant.** The significance of an economic benefit must be determined on a case-by-case basis. The relative insignificance of the economic benefit depends on the impact it will have on the violation and the size of civil charges exclusive of the economic benefit calculation.
- **Compelling public concern.** Compelling public concern as a basis for mitigating the economic benefit amount may be significant when the amount of the economic benefit calculated may result in an extreme financial burden and there is important public interest in retaining the source. Public concern may be a factor where the violators are public entities.
- **Existing administrative action or order.** Where a source is in the process of settling a previous civil charge it may be appropriate to consider adjustments to the economic benefit calculation.

11. Charge Adjustment Calculation

In order to promote equity in the process of assessing a civil charge, the process for developing a civil charge must be flexible enough to account for factors that are unique to each source. The incorporation of case-by-case mitigating factors, however, must be done in a manner that does not sacrifice consistency. This is accomplished by establishing "adjustment factors" that provide a basis for distinguishing among individual enforcement actions. For the purposes of civil charge adjustment, these factors are: degree of willfulness or negligence, degree of cooperation, and environmental damage.

The calculated charge for the Worksheet *excluding the economic benefit calculation* can be reduced by up to 30% for cooperation and a good faith effort to comply with regulatory requirements or permit conditions. These good faith efforts could come in the form of prompt reporting of noncompliance, prompt correction of environmental problems, and cooperation during pre-filing investigation. The degree of cooperation is the only basis for reducing a civil charge. The degree of willfulness or negligence and environmental damage are only applicable in this context as reasons for increasing the civil charge.

- **Civil Charge Disclosure** - It is the DEQ's approach to be totally open with the source and the public regarding the worksheet and the basis for the civil charge.
- **Additional Civil Charge Reduction** - The total civil charge may be reduced by more than 30% if extraordinary circumstances exist. Additional reductions must be evaluated by OEC for consistency and approved by the Regional Compliance and Enforcement Manager.

The Worksheet has a category entitled "Charge Adjustment Calculation," which is used to calculate the adjustment to be applied to the total charge. This category should contain the amount of any charge reduction and the charge adjustment factor. The civil charge adjustment factor shall be applied to the total charge *after the economic benefit amount has been subtracted*. The final Charge Adjustment is then subtracted from the total calculated civil charge to obtain the final assessed civil charge.

C. ABILITY TO PAY A CIVIL CHARGE

The overriding mitigating factor in adjusting civil charges and economic benefit is the source's ability to pay. DEQ must consider reducing the amount assessed on a violation when that amount is beyond the violator's means.

Table 1.

OPACITY AND EMISSION LIMIT VIOLATIONS

MONETARY CIVIL CHARGE MATRIX

% over allowed opacity limitation	SOURCE CLASSIFICATION		
	A	SM	B
10	$200	$100	$50
20	300	150	100
30	400	250	150
40	500	350	200
50	600	450	250
60	700	550	300
70	800	650	350
80	900	750	400
90	1,000	850	450
100	1,100	950	500
200	2,000	1,500	1,000
300	5,000	3,000	1,500
400	10,000	6,000	2,000

OPACITY VIOLATION EXAMPLE:

An SM source is allowed 5% opacity for a baghouse controlling a point source. Method 9 shows 40% opacity. Calculate the assessment for the opacity violation.

1. **Subtract the allowed limitation (5%) from the results from Method 9 (40%) to obtain the % OVER.** In this case, the resultant is 35%.

2. **Locate the % OVER in Table 1. above.** The table reports percentages in steps of 10%. Read 30% ($250) and 40% ($350) and record these same numbers.

$$\frac{35-30}{40-30} x(350-250) = \$\ 300\ Civil\ Charge$$

3. **Interpolate to determine the charge for the opacity violation.**

Table 2.

COMPLIANCE HISTORY (previous 36 months)

Number of Violations	Charge Factor
Second Violation	.50
Third Violation	1.00
Over Third Violation	(N–3)+1.00

TO CALCULATE A COMPLIANCE HISTORY CHARGE

1. ***Review the sources compliance history to determine if any additional violations were noted during the previous 36 months.*** For example, the source had a previous NOV issued 14 months prior to the currently pending enforcement action (do not include additional violations which were discovered as part of the same inspection).

2. ***Look up on the above table and determine the appropriate factor to adjust the civil charge.*** The current enforcement action represents the second violation in 36 months so the Charge Factor is 0.50 (or 50%).

3. ***Multiply the base amount of the civil charge calculated on the Worksheet by the Charge Factor***. From the example above the base charge is $1,000. Multiplying $1,000 by 0.5 yields $500.

4. ***Write the calculated amount of the civil charge into the entry block in item "8. Compliance History" on the Civil Charge Calculation Worksheet.***

		Violations		
		Serious	Moderate	Marginal
1. Permit Violation - Multiply by 2 if PSD/NESHAPs/ or NSPS				
a. Is a permit required? (if No, go to 1.c below)	Yes No	$6,000	$2,000	$1,000
b. Is the source operating without the required permit?	Yes No	$4,000	$2,000	$1,000
c. Is a permit/regulation violated? (excluding 4 below)	Yes No	$2,000	$1,000	$600
2. Consent Order Violation				
a. Is a Consent Order condition violated?	Yes No	$4,000	$2,000	$1,000
3. Pollution Control Equipment Violation				
a. Is equipment installed? (If no, assess charge, go to 4)	Yes No	$10,000	$6,000	$2,000
b. If installed, is equipment operating properly?	Yes No	$10,000	$6,000	$2,000
4. Emission/Monitoring Violations				
a. Visible Emissions	Yes No	See Table 1		
b. Emission Standards or Limits	Yes No	See Table 1		
c. CEM Violations	Yes No	See Table 2		
d. Toxic Pollutant	Yes No	$2,000	$1,000	$600

5. Sensitivity of the Environment				
a. Nonattainment area		$4,000	$2,000	$1,000
b. Class I PSD area		$2,000	$1,000	$600
c. Class II and III PSD area		$1,000	$400	$200
6. Preliminary Civil Charge Subtotal				
7. Length of Time Factor		See Table 3		
8. Compliance History		See Table 4		
9. Extended Compliance		See Table 5		
10. Economic Benefit		BEN Model		
11. Charge Adjustment Calculation (Maximum = 30%)		Factor =		
Total Civil Charge				

II. THE WASTE PROGRAM

DEQ negotiates with parties for the payment of civil charges for past violations in an order issued by the Waste Management Board pursuant to the Waste Management Act, Va. Code § 10.1-1455. The maximum limit for a civil charge is $25,000 for each violation, with each day being a separate violation.

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

As an initial matter, the enforcement staff determines whether the alleged violation is of a nature to warrant a civil charge. The following basic criteria should be met in all such cases without civil charges: there has been no or minimal environmental impact, the facility is not a chronic facility, and the facility is making a good-faith effort to comply. The emphasis in all cases, but particularly in cases without civil charges, should be on prompt and appropriate injunctive relief. No civil charge or economic benefit need be computed for cases qualifying under this section.

B. CONSENT ORDERS WITH CIVIL CHARGES

Civil charges are calculated for all waste programs using the Waste Civil Charge Worksheet, which is found at the end of the Waste Program section. A separate Worksheet is completed for each alleged violation. Multiple violations that arise out of a single act or omission may be consolidated into a single violation for purposes of calculating civil charges. In no case may the total civil charge for a single violation exceed the statutory maximum of $25,000 per day of violation.

In calculating the appropriate civil charge, enforcement staff addresses the following seven components which are discussed in greater detail below.

- Gravity-based component, which is calculated before any adjustments are made
- "Multi-day" component, as appropriate, to account for continuing violations
- The facility's degree of culpability
- The facility's compliance history
- Economic benefit of noncompliance, if appropriate
- An adjustment component, to include cooperativeness/quick settlement, promptness of injunctive relief/good faith effort to comply, and strategic considerations
- Ability to pay

C. GRAVITY-BASED COMPONENT

The gravity-based component is assessed based on the violation's "potential for harm" and the extent to which the violation deviates from the regulatory requirement, which is facility's status as SNC or SV.

1. Potential for Harm

There are three categories of "potential for harm" into which a violation may be placed which are "Serious," "Moderate," and "Marginal." These categories are used throughout the Worksheet for each component.

- **SERIOUS:** (1) The violation has caused actual exposure or presents a *substantial risk* of exposure of humans or other environmental receptors to waste or constituents; and/or (2) the actions have or may have a *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.
- **MODERATE:** (1) The violation presents or may present a *significant risk* of exposure of humans or other environmental receptors to waste or constituents; and/or (2) the actions have or may have a *significant adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.
- **MARGINAL:** (1) The violation presents or may present a *relatively low risk* of exposure of humans or other environmental receptors to waste or constituents; and/or (2) the actions have or may have a *small adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

A facility is placed into one of these categories based on: (1) the extent of risk of exposure of humans or other environmental receptors, and/or (2) the effect on the regulatory program.

a. **Risk of Exposure.** Risk of exposure involves both the probability of exposure and potential consequences that may result from exposure.

- *Probability of Exposure*. Where a violation involves the actual management of waste, a civil charge should reflect the probability that the violation could have or has resulted in a release of waste or constituents or could have or has resulted in a condition that creates a threat of exposure to waste or waste constituents. The likelihood of a release is determined based on whether the integrity and/or stability of the waste management unit is likely to have been compromised. Some factors to consider in making this determination are: (1) evidence of release (*e.g.*, existing soil or groundwater contamination), (2) evidence of waste mismanagement (*e.g.*, rusting drums), and (3) adequacy of provisions for detecting and preventing a release (*e.g.*, monitoring equipment and inspection procedures). A larger civil charge is presumptively appropriate where the violation significantly impairs the ability of the waste management system to prevent and/or detect releases of waste and constituents.
- *Potential Consequences*. In calculating risk of exposure, enforcement personnel weigh the harm that would result if the waste or constituents were in fact released to the

environment. Some factors to consider in making this determination are: (1) quantity and toxicity of wastes (potentially) released; (2) likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater); and (3) existence, size, and proximity of receptor populations (*e.g.*, local residents, fish and wildlife, including threatened or endangered species) and sensitive environmental media (*e.g.*, surface waters and aquifers).

In considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. The presence or absence of direct harm in a noncompliance situation is something over which the facility may have no control. Such facilities should not be rewarded with lower civil charges simply because the violations happened not to have resulted in actual harm.

b. **Effect on the regulatory program.** There are some requirements of the Waste Program that, if violated, may not likely give rise directly or immediately to a significant risk of contamination. Nonetheless, all regulatory requirements are fundamental to the continued integrity of the regulatory program. Violations of such requirements may have serious implications and merit a substantial civil charge where the violation undermines the statutory or regulatory purposes or procedures for implementing the regulatory program. Examples of regulatory harm include, but are not limited to:

- Failure to notify as a generator or transporter of hazardous waste and/or owner of a hazardous waste facility
- Failure to comply with financial assurance requirements
- Failure to submit a timely/adequate solid waste Part B application
- Failure to respond to a formal information request
- Operating without a permit or interim status
- Failure to prepare or maintain a hazardous waste manifest
- Failure to install or conduct adequate groundwater monitoring.
- Certain failures to comply with record keeping that undermine DEQ's ability to determine compliance

2. Extent of Deviation: SNC/SV Status

The extent to which the violation deviates from the regulatory requirement is the second factor considered in assessing the gravity-based component. For hazardous waste, the extent of deviation is based on the status of a facility as SNC or SV under the 1996 EPA Enforcement Response Policy. This determination will normally already have been made as part of the enforcement referral process.

For purposes of evaluating non-hazardous solid waste civil charges, violations that result in enforcement referral are SNC. Other violations that, by themselves, do not cause the referral are SV.

D. MULTI-DAY COMPONENT

The multi-day component is assessed for days 2 through 180 of continuing violations. This component is calculated by multiplying the number of days of continuing violations ("n") by the factor in the appropriate matrix cell. Use of a multi-day component beyond 180 days is discretionary. The "potential for harm" determination already made for calculation of the gravity-based component is used to select the appropriate cell on the Worksheet for this component. Use of a multi-day component is presumed for days 2 through 180 of all violations that caused a facility to be designated as a SNC. The multi-day component may be waived where good cause for waiver is documented in the ERP.

E. DEGREE OF CULPABILITY

Under this provision, the civil charge is increased if there is substantial evidence that the alleged violation was caused by the negligence of the facility or by a deliberate act of the facility. The "potential for harm" determination already made for calculation of the gravity-based component is used to select the appropriate cell on the Worksheet for this component.

For purposes of calculating the civil charge on the Worksheet, violations of Consent Orders are presumed to be the result of either a negligent or a deliberate act of the facility.

F. COMPLIANCE HISTORY

This provision increases the civil charge for repeat violations of the same requirement within at least the previous 36 months of the violation. In evaluating this factor, it should be remembered that the owner=s history is at issue, not the facility=s. Consequently, for example, if a facility with a history of noncompliance is purchased or taken over by a new owner with little or no such history, this factor component may not be assessed.

The "potential for harm" determination already made for calculation of the gravity-based component is also used to select the appropriate cell on the Worksheet for this component.

G. ECONOMIC BENEFIT OF NONCOMPLIANCE

This provision recovers the economic benefit of noncompliance derived from the violation. This factor may be calculated with the EPA computer model BEN. The calculation is made based on the Cumulative Subtotal arrived at on the Worksheet before adjustments, if any, are made.

The intent is to recoup the economic benefit of noncompliance in all cases. There are four general areas, however, where settling for less than the total civil charge amount for less than the economic benefit may be appropriate. The four exceptions are:

- The economic benefit component consists of an insignificant amount (*i.e.*, less than $2500).

- There are compelling public concerns that would not be served by taking a case to trial.
- It is unlikely, based on the facts of the particular case as a whole, that DEQ will be able to recover the economic benefit in litigation.
- The facility has documented an inability to pay the total proposed civil charge.

F. ADJUSTMENT FACTORS

The civil charge Cumulative Subtotal – *excluding the economic benefit of noncompliance calculation* – may be reduced by up to 30% based on several factors where there are clearly documented case-specific facts that support the adjustment. Those factors include cooperativeness/quick settlement, promptness of injunctive response/good faith effort to comply, and strategic considerations. Any decision whether or not to apply any adjustments is within the sole discretion of the appropriate DEQ management. Decisions regarding adjustment are not subject to administrative appeal or judicial review. The justification for applying an adjustment must be reasonable and documented in the ERP.

1. Cooperativeness/Quick Settlement

An adjustment may be provided where the facility is cooperative in resolving the case in a timely and appropriate manner and it makes a good faith effort to settle the violations quickly.

2. Promptness of Injunctive Response/Good Faith Effort to Comply

Good faith efforts to comply with regulatory requirements or permit conditions could come in the form of prompt reporting of noncompliance or prompt correction of environmental problems. A reduction may be given to facilities that promptly initiate corrective actions in response to violations. Consideration should be given to institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures. Owners who agree to expedited corrective action schedules may qualify for this reduction. Also, the replacement of facility management who might have been unresponsive to violations, unbeknownst to facility owners, may be considered.

In evaluating this reduction factor, it is appropriate to consider the effectiveness and quality of DEQ notification, compliance assistance, and general customer service given to the facility following violations or identification of compliance problems.

3. Strategic Considerations

Strategic considerations include litigation potential, the precedential value of the case, the size of the facility, problems of proof in the case, impacts or threat of impacts (or lack thereof) to human health or the environment, and probability of meaningful recovery of civil charges and/or costs.

H. ABILITY TO PAY

A reduction based on inability to pay may be considered in a case where the facility has demonstrated that a significant economic hardship would result from the full civil charge. The burden to demonstrate inability to pay rests on the facility. The EPA computer models ABEL, INDIPAY, or MUNIPAY may be used to evaluate ability to pay.

If a facility cannot pay the civil charge otherwise called for by this policy or would be prevented from carrying out essential remedial measures by paying the full amount, the following options should be considered in the order presented:

- Installment payment plan with interest
- Delayed payment schedule with interest
- Reduction based on ability to pay modeling

WASTE CIVIL CHARGE WORKSHEET

Waste Civil Charge Worksheet			Potential	For Harm	
Violation No. ___			Serious	Moderate	Marginal
1. Gravity-based component					
a. Does violation meet SNC criteria?	Y	N	20,000	8,000	1,500
b. Does violation meet SV criteria?	Y	N	11,000	3,000	100
c. Gravity-based subtotal					
2. Multi-day component (n = number of days of continuing violation)					
a. Does the multi-day component apply? If no, go to #3.	Y	N			
b. Does violation meet SNC criteria?	Y	N	1,000 x n	400 x n	100 x n
c. Does violation meet SV criteria?	Y	N	550 x n	150 x n	100 x n
d. Multi-day subtotal					
3. Degree of culpability.					
a. Is there substantial evidence of Willfulness or negligence?	Y	N	5,000	3,000	1,500
b. Culpability subtotal					
4. Compliance history					
a. For an SNC, has this violation occurred before within the past 36 months?	Y	N	5,000	3,000	1,500
b. For an SV, has this violation occurred Before within the past 36 months?	Y	N	4,000	2,000	400
c. Compliance history subtotal					
5. Cumulative Subtotal (lines 1c+2d+3b+4c)					
6. Economic benefit of noncompliance					
TOTAL					

III. THE WATER PROGRAM

The State Water Control Law (AWater Law@) at Code ' 62.1-44.32 provides for the inclusion of negotiated civil charges in Consent Orders with a facility for violations of the Water Law and Regulations. The maximum limit for a civil charge is $25,000 for each violation, with each day being a separate violation.

The procedures in Part B of this section address the calculation of civil charges under the Water Law and Regulations for settlement purposes in VPDES, VWPP, VPA, GWPP, AST, and UST cases. Part C of this section addresses the calculation of civil charges for confined animal feeding operations (ACAFOs@). Under Code ' 62.1-44.17:1(J), permittees in violation of CAFO general permits are subject to a maximum of $2,500. Part D of this section addresses calculation of civil charges for oil spills, which have a unique civil charge scheme under ' 62.1-44.34:20 of up to $100 per gallon of petroleum released to the environment.

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Consent Orders can be executed without civil charges when in DEQ's judgment it is in the best interest of public health or the environment, or both. The following basic criteria should be met in all cases without civil charges: there has been no or minimal environmental impact, the facility is not a chronic facility, and the facility is making a good-faith effort to comply. The emphasis in all cases, but particularly in cases without civil charges, should be on prompt and appropriate injunctive relief. No civil charge or economic benefit need be computed for cases qualifying under this section. Assuming the basic criteria are met, the following types of cases may qualify. This list is illustrative and not intended to be exhaustive.

- Municipal VPDES (major or minor) upgrade or expansion or collection system correction delayed due to the inability to secure funding.
- Where interim limits are needed pending connection to municipal wastewater treatment system or a larger regional wastewater treatment system.
- Minor VPDES permittees, such as trailer courts operating lagoons or other antiquated systems that will eventually shut down or be connected to a sewer system.
- Violations resulting from unavoidable or unforeseeable events, and also of short duration with little or no environmental impact, but not including violations of reporting requirements.

B. CONSENT ORDERS WITH CIVIL CHARGES

Civil charges are generally appropriate in Consent Orders when one or more of the following criteria are met: failure to respond to technical assistance efforts, violation of enforcement orders without mitigating circumstances, violations that are avoidable, noncompliance that is continuing or likely to recur, knowing violations, or violations resulting in environmental damage.

Before calculating the civil charge, the statutory maximum civil charge ($25,000 per violation per day in most cases) is estimated to determine the maximum liability of the facility. This can be useful information in negotiations, as facilities should be mindful of the liability they might face in a judicial proceeding.

To calculate the appropriate civil charge in an administrative settlement:

- Determine the civil charge per violation, generally on a Aper month@ of violation basis for effluent limits and failure to report and on a Aper event@ basis for violations such as unpermitted discharges or failure to implement proper operations and maintenance procedures;
- Estimate the cost of injunctive remedies needed to resolve the case;
- Determine economic benefit; and
- Then use these values to determine the baseline civil charge.

The baseline civil charge may be reduced based on the following factors: size and type of facility, history of recalcitrance, promptness of injunctive response, quick settlement adjustment, litigation considerations, and ability to pay. As noted above, the final recommended civil charge cannot exceed the statutory maximum amount.

1. Charge Per Violation/Gravity Component

When civil charges are warranted, the civil charge is determined using the Water Civil Charge Worksheet, which is found at the end of Section B. Effluent limitation charges and other ongoing violations are added on a monthly basis. APer event@ charges are added on a one-time basis. These charges would generally be capped at $50,000 per month.

The amounts on the Water Civil Charge Worksheet include a gravity component that is measured as “Serious,” “Moderate” or “Marginal” and takes environmental impact and the severity of the alleged violation into consideration. Environmental impact considerations evaluate the site-specific occurrence of or likelihood of impacts or damage to human health or the environment. Severity considerations examine whether the violations or pattern of violations at issue are those that are fundamental to the continued integrity of the regulatory program. Violations of such requirements may have serious implications and merit substantial civil charges where the violation undermines the statutory or regulatory purposes or procedures for implementing the regulatory program.

The three categories are defined as follows:

- **SERIOUS**: (1) The violation has impacted or presents an *imminent and substantial risk* of impacting human health and/or the environment such that serious damage has resulted or is likely to result, and/or (2) the actions have or may have a *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program. Examples include fish kills, effluent violations resulting in loss of beneficial uses, failure to report an unpermitted discharge, or chronic refusal to apply for a permit or perform TMP.

- **MODERATE**: (1) The violation presents or may present *some risk* of impacting the environment, but those impacts would be minimal and correctable in a reasonable period of time, and/or (2) the actions have or may have a *noticeable adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program. Examples include unpermitted discharges resulting in identifiable sedimentation into state waters, failure to observe BMPs in VWPP permits, preventable accidents, or chronic late submission of monitoring reports or permit application materials.
- **MARGINAL**: (1) The violation presents *little or no risk* of environmental impact, and/or (2) the actions have or may have a *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program. Examples include, but are not limited to: an improperly completed DMR, minor exceedances (*i.e.*, less than or equal to 10% of the allowable limit) in land application with no impact to ground or surface water.

2. Cost of Injunctive Remedy

The cost of the injunctive remedy necessary to bring the facility back into compliance should be estimated for later use in the calculation.

3. Economic Benefit

The removal of the economic benefit of noncompliance serves to place the facility in the same position it would have been if compliance had been achieved on time. Both deterrence and fairness require that the civil charge include, as appropriate and practicable, an additional amount to ensure that the facility is economically worse off than if it had obeyed the law.

Facilities that violate the Water Law may have obtained an economic benefit as a result of delayed or completely avoided pollution control expenditures during the period of noncompliance. Commonly delayed or avoided expenditures include, but are not limited to:

- Monitoring and reporting (including costs of the sampling and proper laboratory analysis)
- Capital equipment improvement or repairs, including engineering design, purchase, installation, and replacement
- Operation and maintenance expenses (*e.g.*, labor, power, chemicals) and other annual expenses
- One-time acquisitions (such as equipment or real estate purchases)

EPA=s BEN model is a method for calculating economic benefit from delayed and avoided expenditures. Refer to the ABEN User=s Manual@ for specific information on the operation of BEN. If the economic benefit exceeds $10,000, BEN should be used to calculate benefit. BEN uses thirteen data variables, of which eight contain default values. The five required variables are information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of

noncompliance. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than $10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.

4. Baseline Civil Charge

One of the main purposes of assessing a civil charge is to ensure significant economic benefit is not gained from failure to comply with the law and regulations. Thus, the baseline civil charge takes into consideration the gravity-based component (cost of the violations), the cost of injunctive relief (what the facility will have to pay to correct the problem), and the economic benefit from noncompliance.

The following steps are taken to determine the Baseline Civil Charge, as set forth on the Worksheet:

- The Gravity-based Component is calculated based on the civil charge assessed per violation and any aggravating factors.
- The Cost of Injunctive Relief (what the facility will have to pay to correct the violations) is estimated.
- These two numbers are added together to get the "out-of-the-pocket" cost of the violations, which is called the Violation/Cost Combined Total.
- The Violation/Cost Combined Total is then compared to the Economic Benefit of Noncompliance, which is determined using the BEN model.
    - If the Violation/Cost Combined Total is less than the Economic Benefit figure, the Economic Benefit number is used for further calculation.
    - If the Violation/Cost Combined Total is greater than the Economic Benefit figure, the Violation/Cost Combined Total is used for further calculation.
- Since the facility will be expending funds to correct the violations (*i.e.*, cost of injunctive relief), that amount is subtracted from the last number calculated above. This number is called the Baseline Civil Charge. By subtracting the cost of injunctive relief, the Baseline Civil Charge number recognizes that, by expending these funds to correct the violations, that portion of the economic benefit gained from not doing so earlier is substantially captured through payment of these expenses.

The total Baseline Civil Charge cannot exceed the total statutory maximum of $25,000 per violation per day of violation.

5. Adjustments

The baseline civil charge may be reduced up to 30% based on several factors, including size and type of facility, history of recalcitrance, promptness of injunctive response, quick settlement

adjustment, litigation considerations, and ability to pay. Any decision whether or not to apply any adjustments is within the sole discretion of the appropriate DEQ management and the State Water Control Board, when it is in session. Decisions regarding adjustment are not subject to administrative appeal or judicial review. The justification for applying an adjustment must be reasonable and documented in the ERP.

a. **Size and type of facility/owner.** Reductions are appropriate for small facilities. Such a reduction, however, may not be appropriate for a small facility owned by a large corporation. Facilities providing a critical community service (*e.g.*, municipal plants, hospitals and schools) are appropriate for this reduction.

b. **History of compliance.** A reduction is appropriate if the owner=s history of recalcitrance is limited or nonexistent. In evaluating this factor, it should be remembered that the owner=s history is at issue, not the facility=s. Consequently, for example, if a facility with a long history of recalcitrance is purchased or taken over by a new owner with little or no history or recalcitrance, a reduction for this factor may be justified.

c. **Cooperativeness/quick settlement.** A reduction may be given to a facility that makes good faith efforts to settle the alleged violations quickly.

d. **Promptness of injunctive response/good faith effort to comply.** Good faith efforts to comply with regulatory requirements or permit conditions could come in the form of prompt reporting of noncompliance or prompt correction of environmental problems. A reduction may be given to facilities that promptly initiate corrective actions in response to violations. Consideration should be given to institutional or legal limitations on corrective actions: for example, a municipality may be unable to institute corrective action immediately because of funding procedures. Owners who agree to expedited corrective action schedules may also qualify for this reduction. Also the replacement of facility management who might have been unresponsive to violations, unbeknownst to facility owners, may be considered.

In evaluating this reduction factor, it is appropriate to consider the effectiveness and quality of DEQ notification, compliance assistance, and general customer service given to the facility following violations or even identification of compliance problems.

e. **Ability to pay.** A reduction based on inability to pay may be considered in a case where the facility has demonstrated that a significant economic hardship would result from the full civil charge. Any facility that qualifies under the ABEL procedure will receive the maximum adjustment for this factor.

f. **Strategic considerations.** Strategic considerations include litigation potential, the precedential value of the case, problems of proof in the case, impacts or threat of impacts (or lack thereof) to human health or the environment, and probability of meaningful recovery of civil penalties and/or costs.

6. Final Recommended Civil Charge

The Baseline Civil Charge minus the adjustments from section five results in the Final Recommended Civil Charge. The ERP must demonstrate the justifications for these calculations and contain approvals from appropriate DEQ management before proceeding to final negotiations with the facility to settle the case. In the event that facts are gleaned during the negotiations that would prompt further adjustment of the Final Recommended Civil Charge, the ERP must be amended accordingly. Clearly documented, case-specific facts may justify adjustment of the Final Recommended Civil Charge for settlement purposes.

WATER CIVIL CHARGE WORKSHEET

1. Gravity-based Component			Serious	Moderate	Marginal	
a. Violations and Frequency ***per MONTH unless noted***			$$ x occurrences	$$ x occurrences	$$ x occurrences	SUBTOTAL
Effluent Limits	Y	N	1K x ____	500 x ____	200 x ____	
Operational Deficiencies	Y	N	1K x ____	500 x ____	200 x ____	
Monitoring/Submissions	Y	N	1K x ____	500 x ____	200 x ____	
Bypasses/ Overflows *per day*	Y	N	500 x ____	300 x ____	100 x ____	
Spills/Unpermitted Discharge/Withdrawal *per event*	Y	N	10K x ____	5K x ____	1K x ____	
Compliance/Construction/Payment Schedules	Y	N	1K x ____	500 x ____	200 x ____	
No Permit/ODCP	Y	N	2K x ____	1K x ____	500 x ____	
Failure to Report *per event, per month*	Y	N	10K x ____	5K x ____	1K x ____	
					Subtotal #1a	
b. Aggravating Factors as Multipliers						
Major Facility?	Y	N	Subtotal #1a x .2			
Consent/Judicial Order Violations?	Y	N	Subtotal #1a x .5			
Deliberate Act?	Y	N	Subtotal #1a x .5			
					Subtotal #1b	
GRAVITY BASED COMPONENT TOTAL (Add Subtotal #1a and Subtotal #1b)					TOTAL #1	
2. Cost of Injunctive Remedy ***estimated***					TOTAL #2	
3. Violation/Cost Combined Total						
Add TOTAL #1 and TOTAL #2					TOTAL #3	
4. Economic Benefit of Noncompliance ***calculated from BEN***					TOTAL #4	

5. Baseline Civil Charge		
If TOTAL #3 (Viol./cost) is GREATER than TOTAL #4 (Econ. ben.), record TOTAL #3 result as SUBTOTAL #5a. If TOTAL #3 (Viol./cost) is LESS than TOTAL #4 (Econ. ben.), record TOTAL #4 as SUBTOTAL #5a	SUBTOTAL #5a	
BASELINE CIVIL CHARGE TOTAL (Subtract TOTAL #2 (cost inj.) from TOTAL #5a, record as TOTAL #5)	TOTAL #5	

6. Adjustments *circle all which apply*					
Size/Type of Facility Owner	History of Compliance	Cooperativeness/ Quick Settlement	Promptness of Injunctive Response/Good Faith Effort to Comply	Ability to Pay	Strategic Considerations

Maximum decrease 30% of Total #5	TOTAL #6	
7. Final Recommended Civil Charge		
TOTAL		

C. CAFO CONSENT ORDERS WITH CIVIL CHARGES

Under Code ' 62.1-44.17:1(J), permittees in violation of CAFO general permits are subject to a maximum civil charge of $2500.

Using the CAFO Civil Charge Worksheet, which follows Section C, staff assess appropriate civil charges on a per settlement action basis. Aggravating factors, including threats to human health and safety, environmental damage, consent order or judicial decree violation or any evidence of deliberate acts or omissions are then assessed to determine the Baseline Civil Charge.

Thereafter, an adjustment of up to 30% may be taken based on the following factors: size and type of facility owner; history of compliance; cooperativeness/quick settlement; promptness of injunctive response/good faith effort to comply; ability to pay; and strategic considerations. These adjustment factors are discussed in the previous section. Decisions regarding adjustment are not subject to administrative appeal or judicial review. The justification for applying an adjustment must be reasonable and documented in the ERP.

The Baseline Civil Charge minus adjustments results in the Final Recommended Civil Charge. In the event that facts are gleaned during the negotiations that would prompt further adjustment of the Final Recommended Civil Charge, the ERP must be amended accordingly. Clearly documented, case-specific facts may justify adjustment of the Final Recommended Civil Charge for settlement purposes. In no event may the final recommended civil charge for CAFO general permit violations exceed $2500. However, onsite violations not addressed under the CAFO section of the Water Law (*e.g.*, such as discharges of pollutants to state waters without a permit) should be assessed separately using the general water civil charge procedures.

CAFO CIVIL CHARGE WORKSHEET

1. Gravity-based Component				
a. Violations *count each violation per INSPECTION unless otherwise noted*		$$$	# of occurrences	$ Subtotal
Failure to monitor soils, waste or groundwater		1,000		$
Failure to maintain records		500		$
Failure to calibrate equipment; on NMP, manufacturers or O&M manuals on site		500		$
Improper documentation of liner, seasonal high water table, siting, design and construction		500		$
Improperly precharged lagoon, insufficient freeboard		1000		$
Improper sludge removal, inadequate vegetative cover, trees or brush on berm		500		$
NMP Violations *per incident*: Maximum waste application exceeded, inadequate crop condition, improper crop rotation, waste applied outside spreading schedule		1000		$
Maximum nutrient loading exceeded, evidence of breeched buffers, runoff or erosion, *per incident*		1000		$
Animal units exceeded		1000		$
NMP not timely revised		1000		$
Other		500		$
		SUBTOTALS		$

b. Aggravating Factors as Multipliers *multiply the Subtotal $$ by 2.5 if any of the following factors apply (circle)*			
Threat to Human Health or Safety	Environmental Damage	Consent/Judicial Order Violation	Evidence of Deliberate Act or Omission

2. Baseline Civil Charge	$

3. Adjustments *circle all which apply, 30% maximum reduction allowed*					
Promptness of Injunctive Response/Good Faith Effort to Comply	Size/Type of Facility Owner	History of Compliance	Ability to Pay	Cooperation/ Quick Settlement	Strategic Considerations

4. Final Recommended Civil Charge (not to exceed $2500)	$

D. OIL SPILL CONSENT ORDERS WITH CIVIL CHARGES

Oil spills are subject to a unique civil charge scheme under § 62.1-44.34:20 in which civil charges are to be calculated based upon the amount of petroleum released into the environment in violation of Code § 62.1-44.34:14 *et seq*., up to $100 per gallon.

Using the Oil Spill Civil Charge Worksheet, which is found after this section, staff evaluate and assess a dollar value of from $0 to $100 for each of seven statutory factors, including: willfulness of violation; damage or injury to state waters or beneficial uses; history of noncompliance; actions undertaken in reporting, containing, and cleaning up the discharge; cost of containment and clean up; nature/degree of injury to health, welfare or property; and available technology to prevent, contain, reduce or eliminate the discharge.

The dollar value for each of the seven statutory factors is then added, and the total divided by seven to provide an average Aper gallon@ civil charge figure. This civil charge figure is then multiplied by the total number of gallons of petroleum released to the environment to determine the Baseline Civil Charge.

Thereafter, an adjustment of up to 30% may be made based on the following factors: size and type of facility owner; history of compliance; cooperativeness/quick settlement; promptness of injunctive response/good faith effort to comply; ability to pay; and strategic considerations. These adjustment factors are discussed in Section B above. Decisions regarding adjustment are not subject to administrative appeal or judicial review. The justification for applying an adjustment must be reasonable and documented in the ERP.

The Baseline Civil Charge minus adjustments results in the Final Recommended Civil Charge. In the event that facts are gleaned during the negotiations that would prompt further adjustment of the Final Recommended Civil Charge, the ERP must be amended accordingly. Clearly documented, case-specific facts may justify adjustment of the Final Recommended Civil Charge for settlement purposes.

OIL SPILL CIVIL CHARGE WORKSHEET

1. Statutory Factors *discuss each and assign a dollar amount to each factor between $0 and $100*					
i. Willfulness of Violation					$ Amount
					$
ii. Damage/Injury to State Waters or Impairment of Beneficial Use					
					$
iii. History of Non-Compliance					
					$
iv. Actions in Reporting/Containing/Cleaning Up the Discharge					
					$
v. Cost of Containment and Clean Up					
					$
vi. Nature/Degree of Injury to Health, Welfare and Property					
					$
vii. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge					
					$
				SUBTOTAL	$
2. Baseline Civil Charge Calculation					
(Subtotal _____) ÷ 7 = _____) 7 =_____ x (Gallons released to the environment _____) =					$
3. Adjustments *circle all which apply, 30% maximum reduction allowed*					
Promptness of Inj. Response Good Faith Effort to Comply	Size/Type of Facility Owner	History of Compliance	Ability to Pay	Cooperation Quick Settlement	Strategic Considerations
4. Final Recommended Civil Charge				**TOTAL**	$

CHAPTER FIVE

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The following procedure is primarily for the use of DEQ enforcement personnel in settling cases. DEQ reserves the right to change this procedure at any time, without prior notice, and to act at variance to this procedure. The SEP procedure does not create any rights, duties, or obligations, implied or otherwise, in any third parties. Nothing in this guideline shall be interpreted or applied in a manner inconsistent with applicable federal law or any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program.

I. STATUTORY BACKGROUND

In settling environmental enforcement cases, the Department will require alleged violators to achieve and maintain compliance with environmental laws and regulations and, as appropriate, to pay civil penalties. In certain instances, environmentally beneficial projects, known as Supplemental Environmental Projects ("SEPs"), may be included in the settlement to further the goals of protecting and enhancing both public health and the environment.

Virginia Code § 10.1-1186.2 defines SEPs and authorizes their use in administrative and judicial orders. The statute defines a SEP as "an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law."

The statute requires that SEPs have a "reasonable geographic nexus to the violation." If no such project is available, then the statute requires that "the project shall advance at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action."

Performance of projects "shall be enforceable in the same manner as any other provision of law."

Provided that the aforementioned requirements are satisfied, categories of projects acceptable under the statute include: public health, pollution prevention, pollution reduction, environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness.

Staff must also consider the following factors in evaluating the appropriateness and value of the proposed SEP: net project costs, benefits to the public or the environment, innovation, impact on minority or low income populations, multimedia impact, and pollution prevention.

The following guidelines are intended to help DEQ staff apply the statutory criteria listed above and utilize SEPs to settle enforcement cases in accordance with the SEP statute.

II. USING THIS PROCEDURE

In evaluating a proposed project to determine if it qualifies as a SEP and then determining how much penalty mitigation is appropriate, enforcement and compliance personnel shall ensure:

- That the project meets the basic definition of a SEP.
- That all legal guidelines, including nexus and enforceability, are satisfied.
- That the project fits within one or more of the designated categories of SEPs.
- The appropriateness and value of SEP by applying appropriate factors.
- Proper calculation of SEP cost and penalty offset.
- That the project satisfies all other criteria.

III. APPLICABILITY

This Procedure applies to all civil judicial and administrative enforcement actions taken by DEQ. It also applies to federal agencies that are liable for the payment of civil penalties.

This is guidance and thus is not intended for use by the staff or any other person at a hearing or in a trial. Further, whether the Department decides to accept a proposed SEP as part of a settlement is purely within the discretion of the Director or the applicable board. Even though a project appears to satisfy all of the provisions of this guidance, the Director or his designee may decide, for one or more reasons, that a SEP is not appropriate (*e.g.*, the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, or the defendant/respondent may not have the ability or reliability to complete the proposed SEP).

IV. DEFINITION OF A SEP

"Supplemental environmental projects" are defined as *environmentally beneficial projects* which a defendant/respondent agrees to undertake in *partial* settlement of an enforcement action, but which the defendant/respondent is *not otherwise legally required to perform*. The three italicized key parts of this definition are elaborated below.

Performance of a SEP shall neither reduce the stringency nor timeliness of requirements of applicable environmental statutes and regulations. Furthermore, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

A. ENVIRONMENTALLY BENEFICIAL

"Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health, and/or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health and/or the environment.

B. IN PARTIAL SETTLEMENT OF AN ENFORCEMENT ACTION

"In partial settlement of an enforcement action" means:

- DEQ has the opportunity to review and approve, and in some cases, help shape the scope of the project before it is implemented; and
- The project is not commenced by the defendant or respondent until after the Department has identified a violation and approved the SEP as part of the settlement of that violation.

C. NOT OTHERWISE LEGALLY REQUIRED TO PERFORM

"Not otherwise legally required to perform" means the project is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent may be required to perform:

- As injunctive relief in the instant case.
- As part of a settlement or order in another legal action.
- By other federal, state or local requirements.

SEPs may not include activities which the defendant/respondent will become legally obligated to undertake within two years of the date of the order (*e.g.*, adopt a more stringent emission or discharge limit). A SEP will not be invalidated after the fact, however, if a regulatory requirement comes into effect within that two years if the requirement is unknown at the time of the SEP approval. Finally, a SEP may not include activities any person or entity is required by law to otherwise perform.

V. LEGAL REQUIREMENTS

Under the statute, the SEP must have "a reasonable geographic nexus" to the violation.[1] If no project is available within the general area, then nexus fails. However, such failure does not necessarily prohibit the use of the SEP. The statute also provides that if there is no project available with a reasonable geographic nexus, then the project may still be acceptable as a SEP provided that the project advances one of the declared objectives of the underlying environmental law or regulation originally violated.

A. GEOGRAPHIC NEXUS

The project shall have a "reasonable geographic nexus" to the violation. For geographic nexus to be reasonable, the project must benefit the "general area" in which the underlying violation occurred

[1] The Department prefers that projects also serve one of the declared objectives of the underlying law or regulation.

(e.g., immediate geographic area, same river basin, same air quality control region, same planning district, or same ecosystem, not to exceed 50 miles from the violation without detailed justification). All SEPs must be performed in the Commonwealth and benefit the Commonwealth.

B. STATUTORY OBJECTIVE

If no project in any media within a reasonable nexus is available, then a SEP will be acceptable only under the statute if it "advances at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action." In other words, if immediate geographic nexus cannot be met, the proposed project must relate to the same environmental law as the underlying violation.

C. ENFORCEABILITY

Performance of SEPs is enforceable in the same manner as any other term or condition of an order. In order to ensure enforceability, SEPs shall be made part of Consent Orders or consent decrees. The document shall accurately and completely describe the SEP, including specific actions to be taken, the timing of such actions, and the result to be achieved. The document shall also contain a means for verifying both compliance and the final overall cost of the project, including periodic reports, if necessary.

It is preferred that the SEP be performed by the defendant/respondent. However, in the event that the SEP is to be performed by a third party (for example, a contribution made to an organization to fund a specific project), then the order or decree must reflect that the defendant/respondent is responsible for the performance of the project (the mere transfer of funds does not discharge the SEP obligation). In the event that monies are paid but the project is not completed, then the SEP will be determined to have failed, and appropriate provisions in the order shall be triggered.

The determination of whether the SEP has been satisfactorily completed is in the sole discretion of DEQ, which shall apply a reasonableness standard in making its determination. When a SEP is used, it may be stated in the order as an injunctive requirement or as a suspended penalty. The payment of the suspended penalty would be triggered by failure to perform or complete the SEP.

If the final cost of the SEP is less than the amount of the penalty agreed to be offset, the difference is not offset and is to be paid to the Commonwealth. However, if the SEP is satisfactorily completed and the defendant/respondent spent at least 90 percent of the amount of money required to be spent on the project, payment of the difference may be waived upon receipt of written approval from the DEQ Director or his designee.

VI. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Code § 10.1-1186.2(C) lists the following categories of projects that may qualify as SEPs: public health, pollution prevention, pollution reduction, environmental restoration and protection,

environmental compliance promotion, and emergency planning and preparedness. Each of these categories is described in greater detail below.

In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Chapter.

A. PUBLIC HEALTH

A public health project provides diagnostic, preventive and/or remedial components of human health care which are related to the actual or potential damage to human health caused by the violation. For example, epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy.

B. POLLUTION PREVENTION

A pollution prevention project is one which reduces the generation of pollution through "source reduction," *i.e.*, any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.) Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures.

Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. "In-process recycling," wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials.

Pollution prevention studies without a commitment to implement the results are not acceptable as SEPs. However, there may be an opportunity for the defendant/ respondent to conduct a pollution prevention study during the negotiation process to determine if an acceptable SEP can be identified.

Staff of the Office of Pollution Prevention are available to assist in the determination of whether or not a project qualifies as *pollution prevention* under this policy.

C. POLLUTION REDUCTION

If the pollutant or waste stream already has been generated or released, a pollution reduction approach — which employs recycling, treatment, containment or disposal techniques — may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology. This also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources.

D. ENVIRONMENTAL RESTORATION AND PROTECTION

An environmental restoration and protection project is one which goes beyond repairing the damage caused by the violation. These SEPs are to enhance the condition of the ecosystem or area in the appropriate geographic nexus area. These projects may be used to restore or protect natural environments, such as ecosystems, and man-made environments, such as facilities and buildings.

Also included is any project which protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem. Examples of such projects include:

- Remediation of abandoned waste sites or brownfields areas.
- Restoration of a wetland along the same avian flyway in which the facility is located.
- Purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation, *e.g.*, a reporting violation, did not directly damage the watershed but potentially could lead to damage due to unreported discharges.

This category also includes projects which provide for the protection of endangered species (*e.g.*, developing conservation programs or protecting habitat critical to the well-being of a species endangered within reasonable geographic nexus to the violation). In some projects where the parties intend that the property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant/respondent may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority, the U.S. Fish and Wildlife Service or the National Park Service.

In some projects where the defendant/respondent has agreed to restore and then protect certain lands, the question arises as to whether the project may include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvement may be included in the total SEP cost provided they do not impair the environmentally

beneficial purposes of the project, and they constitute only an incidental portion of the total resources spent on the project.

With regards to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and leaded paint, which are a continuing source of releases and/or threat to individuals.

E. ENVIRONMENTAL COMPLIANCE PROMOTION

An environmental compliance promotion project provides training or technical support to other members of the regulated or impacted community to:

- Identify, achieve and maintain compliance with applicable statutory and regulatory requirements.
- Avoid committing a violation with respect to such statutory and regulatory requirements.
- Go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements.

For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/ respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the defendant/respondent's economic sector.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where the Department has reason to believe that compliance in the sector would be significantly advanced by the proposed project.

F. EMERGENCY PLANNING AND PREPAREDNESS

An emergency planning and preparedness project provides assistance -- such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training -- to a responsible state or local emergency response or planning entity. In order to qualify, these projects must be identified in the approved emergency response plan as an additional unfunded resource necessary to implement or exercise the emergency plan in accordance with Section 303 of the federal Emergency Planning and Community Right-to-Know Act ("EPCRA"). This is to enable these organizations to fulfill their obligations under the EPCRA to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees ("LEPCs") and Local Fire Departments ("LFDs"). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

G. PROJECTS THAT ARE NOT ACCEPTABLE AS SEPS

Except for projects which meet the specific requirements of one of the categories enumerated in this section, the following are examples of the types of projects that are not allowable as SEPs:

- General educational or public environmental awareness projects, *e.g.*, sponsoring public seminars, conducting tours of environmental controls at a facility, donating museum equipment.
- Contribution toward environmental research to a college or university without ensuring that the subject of the research will serve the reasonable geographic nexus area of the underlying violation.
- Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, *e.g.*, making a contribution to charity for a non-specific purpose, or donating playground equipment.
- Studies undertaken without the intent to address specific environmental problems (if practicable, studies should include a commitment to implement the results).
- Any SEP offered in satisfaction of an unsuspended or stipulated penalty.
- Anything that must otherwise be performed by the Commonwealth or the federal government.

VII. APPROPRIATENESS AND VALUE OF THE SEP

When evaluating the quality of a SEP, the result of the SEP performed by the facility should be at least as beneficial to the environment as a clean-up project that may be performed by the DEQ with the civil charges deposited to the Virginia Environmental Emergency Response Fund ("VEERF").

Factors which *must* be considered under §10.1-1186.2(C) include:

A. NET PROJECT COST

See Section VIII.

B. BENEFIT TO THE PUBLIC OR THE ENVIRONMENT

While all SEPs benefit public health or the environment, SEPs which perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats).

C. INNOVATION

SEPs which perform well on this factor will further the development and implementation of innovative processes, technologies, or methods which more effectively: reduce the generation, release or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; or promote compliance. This includes "technology forcing" techniques which may establish new regulatory "benchmarks."

D. IMPACT ON MINORITY OR LOW INCOME POPULATIONS

SEPs which perform well on this factor will mitigate damage or reduce risk to minority or low income populations which may have been disproportionately exposed to pollution or are at environmental risk.

E. MULTIMEDIA IMPACT

SEPs which perform well on this factor will reduce emissions to more than one medium.

F. POLLUTION PREVENTION

SEPs which perform well on this factor will develop and implement pollution prevention techniques and practices.

VIII. CALCULATION OF THE CIVIL CHARGE OFFSET AND THE SEP COST

A. CALCULATION OF THE CIVIL CHARGE OFFSET

The amount of civil charge shall be calculated in accordance with the appropriate DEQ civil charge calculation procedure. See Chapter Four. No SEP shall be considered until a civil charge is calculated by the media civil charge guidance, in conjunction with any applicable small business considerations, small community policy and ability to pay. Generally, if an order includes a SEP, the Department shall recover, as a cash civil charge payment:

- The economic benefit of noncompliance plus 10 percent of the civil charge matrix/table amount, OR
- 25 percent of the civil charge matrix/table amount,

whichever is *greater*. The *remainder* of the calculated civil charge may be offset by a SEP, at the discretion of the appropriate Director, agency or board. In cases involving government agencies or entities, such as municipalities, or non-profit organizations, where the circumstances warrant, the Department may determine, based on the nature of the SEPs being proposed, that an appropriate settlement could contain a cash civil charge less than what is described above. In no event may a SEP offset 100% of a civil charge.

B. CALCULATION OF THE COST OF THE SEP

The defendant/respondent shall provide an accounting of the SEP, including tax savings, grants and first-year cost reductions and efficiencies. If the proposed SEP is for a project for which the defendant/respondent will receive identifiable tax savings (*e.g.*, tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the value of the SEP shall be reduced by those amounts.

The defendant/respondent may provide to the Department certification from a Certified Public Accountant that the valuations provided to the Department are net SEP costs, or the Department may use the EPA computer model PROJECT to calculate net costs. A copy of the PROJECT software and the users manual can be downloaded by accessing EPA's financial analysis computer models web page at http://es.epa.gov/oeca/models/project.html. To employ PROJECT, the user needs reliable estimates of the costs and savings associated with the performance of a SEP. If the PROJECT model reveals that a project has a negative cost, this means that it represents a positive cash flow to the defendant/respondent and as a profitable project thus, generally, is not acceptable as a SEP.

IX. OTHER CONSIDERATIONS

The type and scope of each project is specified in the signed Consent Order. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be determined later (after DEQ signs the Consent Order) are not allowed.

All SEPs shall be approved as an Addendum to an Enforcement Recommendation and Plan (ERP). The form for the Addendum is found at Attachment 5A-1. If a SEP impacts more than the originating Region, the latter shall send a short memorandum describing the SEP to each region impacted and inviting their comments prior to rendering final approval. Similarly, Central Office shall be contacted whenever a state-wide SEP is proposed.

If there is an issue or question about whether a proposed SEP is consistent with the statute or this procedure (or how a project can be modified to become consistent), the Region should consult with the Central Office. In such cases, the Central Office may seek legal advice on the proper drafting of SEPs prior to issuing the enforcement document. Regions should also consult with Central Office when

SEPs are proposed for the settlement of Significant Violator or Significant Noncompliance cases. Consultation with EPA may be appropriate depending on the case.

Any decision whether or not to agree to a Supplemental Environmental Project is within the sole discretion of the applicable board, official or court and shall not be subject to appeal.

All statutory public comment periods should be completed prior to final execution of orders that include SEPs. In water cases, public notice and comment period should be completed prior to presentation of the settlement to the State Water Control Board. Otherwise, inclusion of a SEP does not affect the normal process for issuing orders.

DEQ may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP, nor may DEQ retain authority to manage or administer the SEP. DEQ may, of course, provide oversight to ensure that a project is implemented pursuant to the provisions of the Consent Order and have legal recourse if the SEP is not adequately performed. It is appropriate, however, for DEQ to maintain a list of projects submitted to the Department by organizations and others which may be acceptable as SEPs provided all appropriate statutory criteria in this guidance is met.

The defendant/respondent shall agree that whenever he publicizes a SEP or the results of the SEP, he will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action. This shall be explicitly stated in the Consent Order.

In the event that the SEP is to be performed by a third party including an environmental group or other non-profit organization, any officer or other official of the defendant/respondent who is also a present officer of the entity selected to perform the SEP must be disclosed in the SEP Analysis Addendum (see Attachment 5A-1) and in any public notice and comment materials.

In each case that a Supplemental Environmental Project is included as part of a settlement, an explanation of the project with any appropriate supporting documentation shall be included as part of the case file.

X. DOCUMENTATION

In each case in which a SEP is included as part of a Consent Order, a written explanation of the SEP with supporting materials (including the PROJECT model printout, where applicable) must be included as an Addendum to the ERP, a copy of which is found at Attachment 5A-1. The explanation in the Addendum shall:

- Demonstrate that all criteria set forth herein are met by the project,
- Describe how nexus and the other legal guidelines are satisfied, and
- Include a description of the expected benefits associated with the SEP.

The Addendum and other documentation and explanations of a particular SEP are public information. However, trade secrets and other information which might appear in SEP documentation which is otherwise exempt from the Freedom of Information Act are to be redacted prior to document

production. The defendant/respondent must assert trade secrets at the time the material is provided to the Department.

SUPPLEMENTAL ENVIRONMENTAL PROJECT ANALYSIS ADDENDUM

Va. Code §10.1-1186.2.A

Case Name:

Project Description:

1. Explain how the project is environmentally beneficial:

2. SEP may only be a partial settlement: show what initial penalty was computed, along with the appropriate SEP amount and final penalty figure:

3. Explain how the SEP is not otherwise required by law:

4. Is there reasonable geographic nexus? If YES, explain:

   If NO, then does the SEP advance one of the declared objectives of the law or regulation that is the basis of the enforcement action? Explain:

5. Check all the qualifying categories that may apply:

- ❑ public health
- ❑ environmental compliance promotion
- ❑ emergency planning and preparedness
- ❑ environmental restoration and protection
- ❑ pollution reduction
- ❑ pollution prevention

6. Each of the following factors MUST be considered. Respond to each:

❑ Net costs (zero out all government loans, grants, tax credits for project). Explain:

❑ Benefits to the public or the environment. Explain:

❑ Innovation. Explain:

❑ Impact on minority or low income populations. Explain:

❑ Multimedia impact. Explain:

❑ Pollution prevention. Explain

CHAPTER SIX

APA ADVERSARIAL PROCEEDINGS

The Virginia Administrative Process Act ("APA"), Code §§ 9-6.14:1 *et seq.*, provides for two types of proceedings that agencies can use to make case decisions. They are: (1) Informal Factfindings as provided in Code § 9-6.14:11 (":11") and (2) Formal Hearings as provided in Code § 9-6.14:12 (":12"). The DEQ statute at §10.1-1186 also provides for the issuance of special orders by the Director of DEQ pursuant to a :11 Informal Factfinding.

The following procedures address how to prepare for and conduct these proceedings. At all times, the APA must be consulted to ensure full compliance with the APA. In addition, the Regional Offices are to consult with the Office of Enforcement Coordination and the Office of the Attorney General in pursuing one of these enforcement actions.

I. INFORMAL FACTFINDINGS AND 1186 SPECIAL ORDERS

After an NOV is issued, the enforcement staff may decide to hold an Informal Factfinding proceeding in accordance with § 9-6.14:11 of the APA to make a case decision regarding a contested issue. The intent of the adversarial Informal Factfinding proceeding is to make a required or necessary case decision without holding a :12 Formal Hearing and, in some cases, to impose an order requiring a facility to take certain actions or refrain from taking certain actions. These case decisions and orders are not rendered and entered into by consent. Unlike Consent Orders that may include agreed-to civil charges, orders issued pursuant to an adversarial :11 proceeding cannot include civil charges or penalties unless the proceeding is a § 10.1-1186 Special Order proceeding.

There are two type of adversarial :11 proceedings available to the Department which essentially differ only in the remedies available to address the noncompliance situation. The first type is the standard Informal Factfinding proceeding provided for in § 9-6.14:11 and the second is a :11 proceeding that results in the issuance of a "1186 Special Order" as provided in § 10.1-1186 of the Code. The other difference between the two is that 1186 Special Orders are orders of the Director, whereas the case decision and order issued pursuant to a standard :11 proceeding are issued on behalf of the particular Board. For the most part, the following procedures apply to both types of proceedings with differences noted where necessary.

A. STANDARD INFORMAL FACTFINDING PROCEEDINGS

The purpose of the standard Informal Factfinding proceeding varies from media to media. Under both the Water and Waste Laws, Informal Factfindings can be used only to make a case decision; they cannot be used to issue orders directing a facility to take an action or refrain from acting. For example, an Informal Factfinding proceeding can be used to determine whether a facility is in fact an owner or operator liable for the correction of a non-compliant situation.

Under the Air Law, however, orders directing a facility to act or refrain from acting are permitted. Thus, an order can be issued on behalf of the Air Board ordering a source to undertake corrective action.

B. 1186 SPECIAL ORDER PROCEEDINGS

Section 10.1-1186(10) of the Code authorizes the Director to issue "1186 Special Orders" following an informal :11 proceeding. An 1186 Special Order is "an administrative order issued to any party that has a stated duration of not more than twelve months and that may impose a civil penalty of no more than $10,000." Only the Director can impose civil penalties in an 1186 Special Order, and that authority by law cannot be delegated.

This enforcement action should be pursued only if (i) the relief sought can be achieved within twelve months and (ii) a maximum penalty of $10,000 is adequate.

As provided in § 10.1-1186(10), 1186 Special Orders may be issued to any person to comply with:

- The provisions of any law administered by the Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board (collectively, the "Boards"), the Director, or the Department.
- Any condition of a permit or certification.
- Any regulation of the Boards.
- Any case decision of the Boards or the Director.

C. PRE-PROCEEDING MATTERS

1. Statutory Rights of the Parties

Code § 9-6.14:11(A) provides that parties to a :11 informal proceeding have the right to:

- Have reasonable notice of the conference;
- Appear in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof;
- Have notice of any contrary fact, basis or information in the possession of the agency which can be relied upon in making an adverse decision;
- Receive a prompt decision;
- Be informed, briefly and generally in writing, of any factual or procedural basis for an adverse decision; and
- Be notified that DEQ intends to consider public data, documents or information.

2. The Notice of the Proceeding

The Notice of the proceeding lays out the basis for the entire case against a party, which forces the staff to put the case down on paper and think through whether there is sufficient evidence to support and prove all of the alleged violations. Where appropriate, the Notice can be combined with the NOV if the decision to hold the :11 proceeding is made at that stage of enforcement.

The Notice must be in writing and contain:

- A recitation of the rights of the party found in § 9-6.14:11 and set forth above.
- The date and time set for the proceeding and the place where it will be held.
- The nature of the proceeding. For example, is the proceeding being held to decide whether or not solid waste has been illegally disposed of? Is it being held with the intent to issue an 1186 Special Order containing penalties?
- The basic law or laws under which the agency intends to exercise its authority. If the Department intends to seek an 1186 Special Order, § 10.1-1186 needs to be cited.
- The facts and pertinent law or regulations implicated for each alleged violation.
- What type of remedy will be sought, to include an 1186 Special Order and civil penalties if applicable.
- Any public data, document and information upon which the agency plans to rely, as provided in § 9-6.14:11(B).

The Notice must be delivered to the named party by one of the following methods: (i) by certified mail, return receipt requested; (ii) by hand-delivery; (iii) by express mail; (iv) or by service of process. Although not provided in the statute, it is recommended that the Notice be sent out 30 days before the proceeding is held. The parties can also agree to a date to be included in the Notice.

3. Presiding Officer

The :11 proceeding may be conducted before "the agency or its subordinates" or before a "Hearing Officer" as defined in Code § 9-6.14:14.1. When a subordinate is used, the appropriate Regional Director appoints the Presiding Officer from among the Department staff.

The Presiding Officer should have some knowledge of the laws and regulations involved in the case. No one who has been substantively involved with the matter may serve as a Presiding Officer or serve in a supervisory role to the Presiding Officer. Mere knowledge of the case or peripheral involvement would not disqualify an employee from acting in this role. Where appropriate, the Presiding Officer may be appointed from the Central Office or another Regional Office.

D. CONDUCTING THE PROCEEDING

The :11 proceeding is conducted to ensure that each party has a fair and adequate opportunity to present data, views, and argument. Section 9-6.14:11 does not provide for cross examination of witnesses. The presiding officer, however, is free to ask any questions necessary to make sure the record is complete and sufficient to base a decision.

1. Venue

The proceeding is conducted in the county or city where the respondent either (i) resides; (ii) regularly or systematically conducts affairs or business activity; (iii) has any property affected by the administrative action; (iv) if the preceding do not apply, in the county or city where the violations are alleged to have occurred; or (v) in another location if all parties agree.

The Regional Office will provide adequate equipment and adequate rooms in which to conduct the proceeding and to accommodate potential witnesses.

2. Recording the Proceeding

Although a transcript is not required by law, it is recommended that a court reporter or other reliable means, such as audio tapes, be used. An accurate record of the proceedings is essential if the case is appealed. The Presiding Officer must also prepare a summary of the proceeding to be included in the Recommendation Packet discussed below.

E. POST-PROCEEDING MATTERS

1. Time Restrictions on Rendering Case Decisions

Where an agency subordinate (*i.e.*, Presiding Officer) is used to recommend a decision, the agency decisionmaker must render the decision within 90 days of the Informal Factfinding or a later date as agreed by the party and the agency. Code § 9-6.14:11(D). This includes the time taken by the Presiding Officer to make a recommendation and by the ultimate decisionmaker to issue a decision and order. The APA must be consulted for the pertinent time restriction when a Hearing Officer is used.

All personnel must recognize that the case may automatically be decided against the agency if the time frames in the APA are not followed. If the agency does not make a decision within 90 days, the party may notify the agency in writing that a decision is due. Code § 9-6.14:11(D). If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party (*i.e.*, default decision). Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

The APA provision for a default decision, noted above, does not apply to the following case decisions:

- Before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act. Code § 9-6.14:11(D).
- Before the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act. Code § 9-6.14:11(D).

In some cases, the parties may wish to submit proposed findings of fact and conclusions of law, briefs, or other post-proceeding documents. If they do, the parties should agree in writing that the time limits for rendering a decision should not begin to run until all such post-proceeding activities are completed. Because the law on this issue is uncertain, written assent to the later starting of the 90-day period is essential.

2. Recommendation of the Presiding Officer

At the conclusion of the :11 proceeding, the Presiding Officer prepares a Recommendation Packet for the ultimate decisionmaker's consideration. The recommendation itself must contain an accurate summary of the issues to include the pertinent facts and the relevant law and should be put in the form of Findings of Fact and Conclusions of Law. The Presiding Officer's recommended action would be included in the Conclusion section of the document. The packet must also contain the complete record of the proceeding, to include all submittals by the parties. It may also include a draft order or 1186 Special Order if recommended.

In order to give the Director adequate time to make a decision within the required 90 days, the Presiding Officer must finalize the recommendation and Findings of Fact and Conclusions of Law no later than 45 days after concluding the proceeding and forward the complete Recommendation Packet to the final decisionmaker during the same time.

3. The Case Decision and Order

The named party to the proceeding is entitled to be informed briefly and generally in writing of the factual or procedural basis for an adverse decision in any case. Code § 9-6.14:11(A)(v). If the decision is in the favor of the named party, the case decision need only indicate that fact. An adverse decision, however, must contain:

- The legal authority for the agency action.
- A recitation of the facts that form the basis for the decision.
- A recitation of the procedural events leading to the informal proceeding.
- The factual basis for the decision, including any statements as to the credibility of witnesses.
- The conclusion as to what violations if any, have occurred.
- A statement when it is effective.
- The party's rights to appeal pursuant to Virginia Supreme Court Rule 2A:2. See section below on Rule 2A:2: Party's Rights of Appeal.

- The Order:
  - The relief must be within that authorized by the basic law such as compliance with regulations, cessation of unlawful discharge, etc.
  - The relief must be within that authorized by regulations.
  - The relief must make sense in the factual setting.
  - The relief must be possible.
  - Signature of the responsible decisionmaker. All USO's containing civil penalties can be signed only by the Director of DEQ.

The ultimate decisionmaker will approve, disapprove or modify the recommendations of the Presiding Officer within the remaining days provided by statute. Where appropriate the decisionmaker can adopt the Department's or the opposing side's Findings of Fact and Conclusions of Law. All proposed :11 case decision and orders and 1186 Special Orders must be reviewed by the Central Office staff and the Attorney General's Office before they are finalized. Thus, it is important to contact these Offices early on and discuss the course of action being contemplated.

4. Rule 2A:2: Party's Rights of Appeal

The following language must be included in any final agency decision made by a Board, the Director, or the Department pursuant to either an adversarial informal proceeding, Code § 10.1-1186 special order proceeding, or a formal hearing:

> As provided by Rule 2A:2 of the Rules of the Supreme Court of Virginia, you have 30 days from the date of service of this decision (the date you actually received this decision or the date on which it was mailed to you, whichever occurred first) within which to initiate an appeal of this decision by filing a Notice of Appeal with:
>
> [Name], Director
>
> Department of Environmental Quality
>
> 629 East Main Street
>
> Richmond, Virginia 23219
>
> In the event that this decision is served on you by mail, 3 days are added to that period. Refer to Part Two A of the Rules of the Supreme Court of Virginia, which describes the required contents of the Notice of Appeal and additional requirements governing appeals from the decisions of administrative agencies.

This language may be included at the end of the case decision or the order or in the cover letter to the case decision and/or order.

5. Service of Case Decision and Order

The case decision and order must be served by mail within five days of the decision being rendered unless service by another means is acknowledged by the named party in writing. All case decision and orders are to be mailed by certified mail, return receipt requested. The certified copy must always be mailed to the party even if represented by counsel.

The signed originals of the case decision and order remain in the custody of the Department, thus only copies are mailed to the named party. A copy is provided to the Central Office for management tracking purposes, and the original is retained in the Regional Office for compliance tracking. 1186 Special Orders are tracked for the same purposes using the same systems as Consent Orders and Consent Special Orders, but are considered a separate category of orders.

6. Appeals

Statutes governing appeals from case decisions are provided for in each media-specific basic law.

II. FORMAL HEARINGS

The basic laws governing air, water, and waste each provide that the appropriate board may issue an order to a party without that party's consent following "notice and hearing." The requirement for notice and hearing means a "Formal Hearing" in accordance with § 9-6.14:12 of the APA (":12"). A Formal Hearing is defined in § 9-6.14:12 as "the formal taking of evidence upon relevant fact issues." Formal Hearings are used whenever the basic law expressly requires that a decision be made upon or after a Formal Hearing and to issue orders. The party has a right to be represented by counsel, but may also represent him or herself. The Department may elect to use a Formal Hearing in the event that a :11 proceeding has not been conducted or where a case has not been resolved by consent. According to the APA, a :11 proceeding must be held before the Formal Hearing unless all parties agree to waive it.

A checklist of steps necessary to prepare for and hold a Formal Hearing is attached to this Chapter.

A. WHEN TO HOLD A FORMAL HEARING

Situations best addressed by a Formal Hearing include those:

- When the agency seeks to revoke a permit, license, or similar grant of a right.
- When the agency seeks to require compliance with a statute, regulation, permit, certification, or case decision.
- When there is a cooperative party, and all parties want a full airing of the issues with cross examination of witnesses, heard by an impartial hearing officer who sorts through the facts and makes an independent recommendation to the agency Director.

- When pursuing persons sensitive to publicity (e.g., municipalities) and persons who are likely to comply with administrative orders.
- When required by statute, including when confirming an emergency order.
- When the agency seeks to compel corrective action under Part IV of the Virginia Solid Waste Management Regulations.

There is usually little value in holding a Formal Hearing when enforcing against a completely uncooperative party unless there is benefit in creating a record before going to court. Formal Hearings can never be held to impose civil charges or penalties because the relevant statutes do not provide for the imposition of penalties following a Formal Hearing.

B. PREHEARING MATTERS

1. Statutory Rights of the Parties

Code § 9-6.14:12 provides that parties to a :12 formal hearing have the right to:

- Have reasonable notice of the hearing.
- Be represented by counsel.
- Submit oral and documentary evidence and rebuttal proofs.
- Conduct such examination as may elicit a full and fair disclosure of the facts.
- Have the proceedings completed and a decision made with dispatch.
- Submit in writing for the record proposed findings and conclusions, and statements of reasons therefor
- Engage in oral argument before the fact-finder.
- Be served with the decision or the recommended decision.

2. The Notice

The Formal Hearing Notice must be in writing and should always be sent by certified mail, return receipt requested. Where appropriate, the Notice can be combined with an NOV if the decision to hold the Formal Hearing is made at that stage of enforcement. The Notice must contain:

- A recitation of the rights of the party found in § 9-6.14:12 and set forth above.
- The date and time set for the proceeding and the place where it will be held.
- The nature of the proceeding. For example, is the proceeding being held to revoke a permit?

- The basic law or laws under which the agency intends to exercise its authority.
- For each alleged violation, the facts and pertinent law or regulations implicated.
- What type of remedy will be sought.

Both the State Water Control Law and the Waste Management Act require that owners be given a 30-day notice of the :12 hearing. While not required by law, the same notice should be given for Formal Hearings conducted pursuant to the Air Pollution Control Law.

3. Hearing Officer

For waste cases, Formal Hearings may be conducted by a Hearing Officer, a quorum of the Waste Board, or by the Director if the Board is not in session. For air cases, Formal Hearings may be conducted by one of the Air Board members, the Director, a staff assistant or a Hearing Officer. For water cases, Formal Hearings may be conducted by either a quorum of the Water Board at a regular or a special meeting, or by a Hearing Officer.

Code § 9-6.14:14.1 governs the use of Hearing Officers. The Executive Secretary of the Virginia Supreme Court maintains a list of all Hearing Officers who can preside over Formal Hearings. The DEQ Director must make a request to the Executive Secretary for appointment of an officer.

C. CONDUCTING THE PROCEEDING

1. Venue

Venue considerations are the same for Formal Hearings as for Informal Factfindings. See previous section on Informal Factfindings.

2. Recording the Proceeding

In a Formal Hearing, the Hearing Officer is empowered under the APA to oversee an accurate verbatim recording of the evidence. In the Water Law, a verbatim record is required by statute. In all other cases, it is recommended that all formal Hearings be recorded in this manner, preferably by a court reporter, to ensure clarity and accuracy.

3. Power and Duties of the Hearing Officer

Pursuant to Code § 9-6.14:12(C), Hearing Officers have the following powers:

- Administer oaths and affirmations.
- Receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proof, rebuttal or cross examination.

- Rule on offers of proof.
- Hold settlement conferences.
- Hold conferences to simplify the issues by consent.
- Dispose of procedural requests.
- Regulate and expedite the course of the proceeding.

D. POST-PROCEEDING MATTERS

1. Time Restrictions on Rendering Case Decisions

Decisions must be rendered within the timeframes required by the APA at § 9-6.14:12(G) or else the decision is deemed to be in favor of the named party (*i.e.*, default decision). The APA provision for default decision does not apply to the following case decisions:

- Before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act. Code § 9-6.14:11(D).
- Before the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act. Code § 9-6.14:11(D).

2. Recommendation of the Hearing Officer

For Waste and Air, the Director of the Department or the Board makes the final decision from a Formal Hearing unless the Department provides that the Hearing Officer shall make findings and an initial decision subject to reconsideration. For Water, the Board must make the final decision.

Before the final decision is rendered, several documents may be filed by the parties, including suggested findings of fact and conclusions of law, corrections to the transcript, a memorandum of law in support of proposed conclusions of law, and a reply to the opposition's proposed findings of fact and conclusions of law. Finally, in certain cases, exceptions may be filed with the Department after the Hearing Officer makes his recommendation or decision to the ultimate agency decisionmaker.

The final decision must make sufficient findings of fact necessary to support each of the conclusions of law set forth in the decision. Where appropriate, the decision can adopt either the Department's or the opposing side's findings of fact.

The final decision must state when it is effective and that it is appealable and must set forth the party's rights to appeal pursuant to Virginia Supreme Court Rule 2A:2. See Section I.E on Rule 2A:2: Party's Rights of Appeal.

3. Effective Dates and Service

Waste Special Orders issued under the law are to be effective not less than 15 days after the mailing of the order. The order is to be sent certified mail. The 15-day period is counted from the date of mailing.

Air Special Orders issued under the statute are effective not less than five days after the service. The order is to be sent by certified mail, return receipt requested or may be delivered by the Board's agent. The five-day time period is counted from the date of receipt of the order.

The Water Law is silent on this provision.

4. Appeals

Statutes governing appeals from case decisions are provided for in each media-specific basic law and in the APA.

CHECKLIST FOR FORMAL HEARINGS

The following is a checklist covering many of the tasks you will need to undertake whenever a formal hearing is contemplated and held.

PRE-NOTICE MATTERS

___ Call AG's Office and let media lawyer know that you are contemplating a formal hearing and provide outline of violations and supporting facts

___ Decide who will conduct the hearing. Is that person authorized?

___ Prepare Notice of Formal Hearing

- ___ State date, time, and place of hearing
- ___ State nature of the case (revocation, suspension, etc.)
- ___ State statutory and regulatory authority for taking this action
- ___ Set forth each alleged violation by identifying statutes and regulations allegedly violated and the facts to support those alleged violations
- ___ Include statement on the rights of the parties, that the hearing will be held pursuant to the APA, and who will be the Hearing Officer
- ___ State who will represent the Department, and provide that person's telephone number
- ___ Offer to discuss settlement within so many days of Notice
- ___ Indicate copies being sent to Hearing Office and OAG

___ Line up your witnesses and make sure they can support your case

___ Call AG's Office and forward draft Notice to media lawyer; agree ready to call for a hearing officer

___ Call Virginia Supreme Court to get Hearing Officer appointed

___ Contact Hearing Officer and found out available dates

___ After receiving OAG's comments, finalize and send Notice **by certified mail, return receipt requested**. Copy OAG and Hearing Officer.

PRE-HEARING MATTERS

___ Prepare and mail letter and professional services contract to Hearing Officer.

___ Prepare and mail a proposed pre-hearing order to Hearing Officer. Copy all parties and OAG.

___ Prepare your case

- ___ Organize order of presenting your case
- ___ Identify all documents and organize as will be used to present case
- ___ Prepare your witnesses
- ___ Prepare opening statement

___ Prepare any request for production of documents, and serve

___ Employ a court reporter

___ Make sure room for hearing is adequate in size and has enough chairs and tables

___ Sketch out proposed findings of fact and conclusions of law

___ Have extra copies of statute, regulations, and any cases available

___ Arrange for someone to assist you at hearing (keep track of exhibits, last minute needs)

___ Put on case as planned, but be prepared for surprises

HEARING

___ Keep track of exhibits, make sure entered as evidence

___ Make sure you put in evidence (documents or oral) on each fact you need to prove

___ Summarize case in closing argument

POST-HEARING MATTERS

___ Prepare proposed findings of fact and conclusions of law

___ Prepare other post-hearing documents as necessary

CHAPTER SEVEN
NORTHERN VIRGINIA VEHICLE EMISSIONS INSPECTION & MAINTENANCE PROGRAM

I. INTRODUCTION

The regulations for the Virginia Vehicle Emissions Control Program are enumerated in the Regulations for the Control of Motor Vehicle Emissions, 9 VAC 5-91 ("Regulations"). The Regulations are promulgated under the authority of §§ 46.2-1176 *et seq.* of the Code of Virginia ("I&M Law"). All permitted emissions inspection stations, licensed emissions inspectors, and certified emissions repair facilities/technicians are required to operate in compliance with these rules and Regulations.

The following procedures are intended to obtain compliance and correct unacceptable station operations or inspection/repair procedures. Violations of the Regulations are divided into two categories, minor and major, based on the seriousness of the violation. In the case of multiple violations considered at one time, the Department of Environmental Quality ("Department") may, in its discretion, direct that suspensions run concurrently.

The Schedule of Penalties is intended only as a guideline in the enforcement of the Regulations. Nothing shall preclude any violation from being considered as a more or less serious violation, if circumstances warrant such action. Suspension for up to one year or revocation may be imposed for any major violation.

Documentation of alleged violations of the Regulations are recorded on the automated Field Inspection Report and Notice of Violation ("NOV").

The Director or a designated representative shall issue and sign Consent Orders, conduct Informal Factfindings and Formal Hearings, make all case decisions, and impose all penalties.

II. NOTICE OF VIOLATION

A. FIELD REPORT

Whenever the Department has reason to believe that a violation may have occurred, the Vehicle Emissions Compliance Officer ("VECO") prepares a field report. The VECO then makes the appropriate entries to identify the alleged violation, summarizes the facts, and initiates the NOV process.

B. NOTICE OF VIOLATION

The purpose of an NOV is to inform the party of certain facts indicating that a violation may have occurred. It also informs the party of various options regarding how to proceed.

The VECO prepares the NOV by making the appropriate data entries as prompted. The Notice cites the applicable provision(s) of the Regulations or Board order involved. The proper major

or minor determination is entered. This determination is made by referring to the Enforcement Procedures and the facility, inspector, or technician Violation History Report. The number of NOVs issued within the last 24 months that resulted in a finding of non-compliance through voluntary or non-voluntary means is entered.

The NOV is served on the affected party(ies) in person or by mail.

C. VIOLATION HISTORY REPORT

The Department maintains a Violation History Report for each permitted station, licensed inspector, certified facility, and certified technician. It lists each incident in which the affected party has been issued an NOV and what was the ultimate disposition of each such NOV. The ultimate disposition indicates whether a case decision was issued by the Department, whether a Consent Order was agreed to, or other appropriate final action.

Previous NOVs, the facts of which are denied by the affected party and for whom no Consent Order has been executed, cannot be considered when determining the appropriate penalty guideline for the current matter unless the Department found in a case decision that the affected party did commit the previous violation. (The appropriate penalty guideline is determined by adding the current, alleged violation(s) and the number of previous confirmed violations (admitted, not admitted but a Consent Order agreed to, or found to be true by the Department) as listed on the Violation History Report, less any alleged violation(s) which has been resolved or disposed of in favor of the affected party or which has not yet been resolved.)

D. ACTION ON THE NOTICE OF VIOLATION

Once an NOV is issued to an affected party, all attempts should be made to negotiate a Consent Order to reach a mutually agreed upon resolution regarding the action that needs to be taken. As explained below, the VECO is responsible for negotiating the Consent Order. This negotiation may take place at the owner's station or at the MSOS office. The procedures for preparing Consent Orders are described below.

If the affected party does not admit to the alleged violation and/or wishes to have an administrative proceeding, the appropriate entry is made on the NOV. The appropriate proceeding is scheduled and the affected party(ies) is properly notified.

If the affected party admits to the alleged violation and does not wish to have an administrative proceeding (or the affected party denies the alleged violation(s) but nevertheless voluntarily agrees to a Consent Order to close or settle the matter), the appropriate entry is made indicating their desire to voluntarily agree to a Consent Order. The VECO then negotiates the terms of the Consent Order and comes to a tentative or proposed agreement with the affected party.

The NOV and supporting documentation is then presented to the Program Manager for review and approval. If the Program Manager agrees with the negotiated terms of the enforcement action as

recommended by the VECO, a written Consent Order indicating the terms of such Consent Order is prepared. If the Program Manager does not concur with the VECO's recommendations, the matter is discussed and an agreement reached regarding any further action which needs to be taken. Upon approval by the Program Manager, the Consent Order and enforcement package, which includes the NOV and supporting documentation, is presented to the Regional Compliance Manager for review and approval or other appropriate action. Upon approval, the enforcement package is presented to the Regional Director for appropriate signature on the Consent Order, except for Consent Orders that contain civil charges (see Sec. III.A below). The Consent Order is then delivered to the affected party for signature and appropriate action.

The affected party is then required to fulfill the terms of the Consent Order.

III. ADMINISTRATIVE PROCEEDINGS GUIDELINES

A. CONSENT ORDERS

The Department may negotiate with inspection stations, certified repair facilities and/or inspector/technicians to obtain compliance with the Regulations through the use of Consent Orders. Consent Orders can be used for the following purposes:

- To require that certain actions be taken to bring the station, facility, inspector, or technician into compliance;
- To impose a period of suspension in accordance with the Schedule of Penalties;
- To require the payment of civil charges as negotiated;
- To include a period of probation;
- To issue a Letter of Reprimand; or
- To take any combination of actions listed above.

The VECO is responsible for negotiating the Consent Order with the affected party. The NOV serves as the basis for the negotiations. If a negotiated agreement cannot be reached between the VECO and the affected party, the matter may be referred to the Program Manager or other Department enforcement staff as directed by regional management, for further negotiation. The Consent Order must be mutually agreed to and signed by the Director or a designated representative as delegated on behalf of the Department. The Program Manager, or the Regional Compliance Manager in the Program Manager's absence, approves all Consent Orders before being signed by the parties.

If the affected party is required to pay a civil charge, the Consent Order should specify whenever possible that the civil charge is due within five (5) days after the affected party signs the order and before the Director or his designated representative signs. If the civil charge is not paid, the Consent Order will not be signed by the Director or designated representative and other enforcement actions may be instituted.

Consent Orders may be used to require remedies (*i.e.*, retraining) other than suspensions or civil charges. The Consent Order is to include all such terms and an agreed action or result if the affected party(ies) fails to comply with such terms, (i.e., failure to comply with a term results in loss of license until compliance is obtained).

Probation may be a condition of a Consent Order. In that situation, the terms of probation, whether a period of time or an act to be accomplished, would be included as an agreed condition of a Consent Order, and would be listed along with any other agreed penalty.

All Consent Orders include a statement to the effect that the affected party agrees to be in compliance with program Regulations.

B. PROCEEDINGS

Two types of administrative proceedings are available for making case decisions to determine if an affected party is in compliance with the I&M Law and the Regulations: Informal Factfindings (which include 1186 Special Order Proceedings) and Formal Hearings. No civil charges can be imposed as a result of these proceedings, unless by mutual agreement in a Consent Order.

The Director or his designated representative is responsible for conducting Informal Factfindings. Records of both types of proceedings will be kept as required by 9 VAC 5-91-60.C. The Director or his designated representative makes case decisions for Informal Factfindings and Formal Hearings. See Chapter 6 on APA Adversarial Proceedings.

1. Informal Factfindings

Informal Factfindings shall be conducted in accordance with 9 VAC 5-91-60 paragraph A.3 of the Regulations and § 9-6.14:11 of the Virginia Administrative Process Act ("APA"). See Chapter 6 on APA Adversarial Proceedings. Informal Factfindings are held in all cases where an affected party denies the alleged violation and/or wishes to have a conference to decide the matter, unless the parties agree to waive the Informal Factfinding and proceed directly to a Formal Hearing. The parties may agree that the Informal Factfinding is the final action and waive the Formal Hearing.

As a result of the Informal Factfindings, the affected party and the Department may agree to a Consent Order as discussed above. If the affected party is found not to be in compliance and no Consent Order is agreed to, the presiding officer then issues a case decision and order in writing.

The case decision and order imposing penalties may be appealed to the Director by requesting a Formal Hearing unless the parties have agreed beforehand that the decision would be the final agency action and the affected party has waived the right to a Formal Hearing. The Director or his designated representative shall be the presiding officer. In accordance with § 46.2-1187.2 and 9 VAC 5-91-600.F, the presiding officer shall be a designee other than the regional emissions inspection program manager or any emissions inspection program staff member in cases involving appeals of penalties.

2. 1186 Special Order Proceedings

In accordance with Va. Code §§ 10.1-1183 and 10.1-1186, the Director of the Department may issue an "1186 Special Order" following an Informal Factfinding Proceeding under the APA. An 1186 Special Order is an administrative order with a duration of no more than 12 months that imposes a civil penalty of no more than $10,000. See Chapter 6 on APA Adversarial Proceedings.

1186 Special Orders should be used sparingly and only for severe cases where it is anticipated that such an order is the only reasonable and timely method of obtaining compliance short of a Formal Hearing under the APA and/or referral to the Office of Attorney General.

3. Formal Hearings

In all cases, an Informal Factfinding must be held first before holding a Formal Hearing unless the parties have agreed to waive the Informal Factfinding or an emissions inspection station has been summarily suspended pursuant to § 46.2-1185 of the I&M Law.

Formal Hearings shall be conducted in accordance with 9 VAC 5-91-60 paragraph A.4 of the Regulations and § 9-6.14:12 of the APA, as modified by § 10.1-1307(D) and (F) of the Virginia Air Pollution Control Law. See Chapter 6 on APA Adversarial Proceedings.

C. SUSPENSION WITHOUT A HEARING

As authorized by Virginia Code § 46.2-1185, the Director or his designated representative is authorized to suspend an emissions inspection station and require the permit holder to cease performing emissions inspections without a formal hearing if the Director finds that the permit holder has violated the I&M Law or any order or Regulation of the Board. Suspensions without hearings are to be used sparingly and only in extreme situations. Some examples of acceptable situations in which to consider this action include:

- The station owner/manager has failed or refused to submit required records or documentation on request of the Department.
- Fraudulent use or issuance of inspection certificates or motor vehicle inspection results.
- Using another's access code to conduct emissions inspections, or permitting or causing such use.
- Conducting inspections using analyzers which are not certified or are malfunctioning to the extent that false emissions readings are being presented.
- Falsifying repair documentation.

NOTE: The above are not exclusive and therefore other circumstances of a similar nature may also apply.

Within ten days of a suspension without a hearing, the Director or designee must hold a Formal Hearing to make findings of fact and conclusions of law regarding the alleged violations. Based on these findings and conclusions, the Director or designee shall make a case decision affirming, modifying, amending, or canceling the suspension and the requirement to cease performing emissions inspections. The procedures referenced above for Formal Hearings must be followed. If the Department fails to hold a hearing within ten days for any reason other than at the request or delay of the permit holder, the suspension will be lifted and the alleged violations pursued through normal administrative processes.

Before the suspension, the Department must notify the permit holder, or make a reasonable attempt to notify the permit holder, about the suspension and the requirement to cease performing emissions inspections immediately. The notice must also inform the permit holder of (1) the I&M Law, Regulations, or Board order allegedly violated; (2) the date, time, and place of the hearing; (3) the legal authority for the suspension and for the hearing; and (4) the permit holder's legal rights regarding the hearing. See Chapter 6 on APA Adversarial Proceedings.

With the consent of the permit holder, the Department may forego the hearing and allow the suspension and requirement to cease inspections to stand for ten days. The decision to let the suspension and the requirement stand shall be set forth in a Consent Order signed by the permit holder and the Department, as specified above.

If the Department finds that a permit holder is not complying with the suspension or the requirement to cease performing inspections, the Department may seek appropriate criminal and civil remedies and penalties under Virginia Code § 46.2-1187 or § 46.2-1187.2.

D. CIVIL CHARGES

As authorized by Virginia Code § 46.2-1187.2, an affected party may agree to pay a civil charge for violating or failing, neglecting, or refusing to obey the I&M Law or any Regulation or order of the Board. The civil charge shall be a specific sum, not to exceed $25,000 for each violation, with each day of violation constituting a separate offense. The civil charge may be agreed to in lieu of a suspension or in addition to a suspension as negotiated between the Department and the affected party. The civil charge shall be included in an order of the Board and signed by the affected party and an authorized Department representative.

Civil charges may be negotiated, and will be based on a number of relevant factors including but not limited to: The number of chargeable inspections that would otherwise have been performed during the negotiated period of suspension, the size of the facility's business, and the seriousness of the violation.

E. PROBATION

A probation period is a negotiable period of time during which more intense scrutiny is appropriate, and may be used as an additional criteria for selection for a covert inspection.

1. Reduction of Probation Period

The period of probation may be reduced by negotiation to include an act on the part of the affected party, completion or satisfaction of which is required of the affected party and will be described in a Consent Order. Such acts may include reporting to a referee facility to demonstrate competence in performing emissions inspections, attending additional training classes, or other actions as negotiated and approved. If combined with a suspension, the negotiated action(s) should be accomplished prior to re-licensing, re-permitting, or re-certification, and the Consent Order will contain any such conditions.

2. Additional Violations During Probation

If another violation of the same category (*i.e.*, major/minor) takes place during a probationary period of time, only that particular violation is addressed. The fact that the person was under probation, however, should be considered during negotiation of a penalty (*i.e.*, the starting point of negotiations should be at the next higher potential penalty level).

F. LETTER OF REPRIMAND

A Letter of Reprimand ("LOR") is a formal document issued to the affected party, which represents a penalty either agreed to in a Consent Order or issued as a result of a case decision and Consent Order. It is an official rebuke for the violation(s), and indicates the serious nature of such violation(s). The Consent Order describing such penalty may also include other penalties such as probation.

Before an LOR is issued, an NOV is issued, the field report will have appropriate remarks, and an LOR is recommended (along with other conditions if appropriate). The enforcement package, which contains the NOV and recommendations, will be submitted for review and approval as provided above.

a. If approved, a Consent Order is prepared.

b. The penalty section of the Consent Order includes an official Letter of Reprimand and is signed by both the designated Department representative and the affected party.

c. If additional terms are agreed to, such as term(s) of probation, they are listed in the same penalty section of the Consent Order.

d. A Letter of Reprimand is prepared, signed by the Program Manager, and issued to the affected party (preferably in person following signing of the Consent Order, but it may be mailed).

IV. SCHEDULE OF PENALTIES

A. MAJOR VIOLATIONS

Major violations are considered the most serious of offenses resulting from unacceptable performances in the conduct of emissions inspections, operation of analyzer systems, and the conduct of emissions related repairs. Such violations are of a nature that would directly affect the integrity, credibility, and emissions reduction effectiveness of the emissions inspection program.

Any major violation may result in suspension or revocation.

NOTE: Pursuant to 9 VAC 5-91-610.H, the Department will not consider an application for reinstatement for at least one year from the date of the revocation for a license, permit, or certification, and until the conditions identified in 9 VAC 5-91-610.H have been satisfied.

A violation of the following provisions of the Regulations shall constitute a major violation:

Permittee:	Licensee:	Emissions Repair Facility:
9 VAC 5-91-220 B, C 9 VAC 5-91-260 B, D 9 VAC 5-91-280 9 VAC 5-91-290 B, G, H 9 VAC 5-91-300 B, C, D, F 9 VAC 5-91-320 A, D 9 VAC 5-91-330 9 VAC 5-91-340 9 VAC 5-91-360 B, C, E 9 VA/C 5-91-370 9 VAC 5-91-410, 420, 430, 440, 450, 460 9 VAC 5-91-480, 490	9 VAC 5-91-290 B 9 VAC 5-91-330 9 VAC 5-91-340 9 VAC 5-91-360 C, E 9 VAC 5-91-370 9 VAC 5-91-380 F, I 9 VAC 5-91-400 9 VAC 5-91-410, 420, 430, 440, 450, 460 9 VAC 5-91-480, 490	9 VAC 5-91-510 C, H 9 VAC 5-91-520 H 9 VAC 5-91-530 A through G Emissions Repair Technician: 9 VAC 5-91-560 C 9 VAC 5-91-570 F 9 VAC 5-91-580 A, D, E

- Obtaining a permit, license or certification by false statement or misrepresentation or operating under a permit, license or certification while not in compliance with the conditions for such permit, license, or certification is a major violation and shall be grounds for revocation.
- Use of alcohol or illegal drugs while performing emissions inspections or emission-related repairs shall be considered a major violation.
- Any third and subsequent minor violation within twenty-four (24) months shall be considered a major violation.
- Any violation of the Virginia Motor Vehicle Emissions Control Law and the Regulations that is not specifically identified in this section may be treated as a major violation if the director determines on a case-by-case basis that the violation fits the criteria for major violations set forth in 9 VAC 5-91-620.A, which is repeated in subsection A of this section.

If an affected party fails to satisfy the condition(s) of a Consent Order which requires an act on the part of that affected party, then that affected party may be charged with a violation of a Consent

Order (reference 9 VAC 5-91-590.B), which may be considered a major violation based on a determination of the Director or his designee that it meets the criteria under 9 VAC 5-91-620.A and F.

B. PENALTY GUIDELINES FOR A MAJOR VIOLATION

Subject to certain conditions as noted above and in B.5 below, the following Schedule of Penalties should be used by the VECO as a guideline for the initiation of negotiations regarding penalties for alleged major violations. Terms of suspension are negotiable, as are the terms and/or conditions of probation.

1. First Violation

The affected party may be suspended for 60 days or more, followed by a period of probation not to exceed twelve months.

2. Second Violation

The affected party may be suspended for 90 days or more, followed by a period of probation not to exceed twelve months.

3. Third Violation

The affected party may be suspended for a period not to exceed one year, followed by a period of probation not to exceed twelve months.

4. Fourth and Subsequent Violation(s)

The emissions inspection station's permit, repair facility's certification and/or inspector/technician's license or certification may be revoked, or suspended for not more than one year, followed by a probation period not to exceed twelve months.

5. Cumulative Nature of Major Violations

Major violations are cumulative in nature and remain active for a period of twenty-four months.

Any first time violation may be disposed of as an official Letter of Reprimand, with negotiated terms and/or conditions of probation if appropriate, in lieu of a suspension period if circumstances warrant. This shall not preclude the possibility of two or more Letters of Reprimand within 24 months if special or extenuating circumstances warrant such action.

Any intentional falsification of an emissions inspection shall result in a revocation or in a suspension of the inspector's license, or the station permit, for not less than six months, or an equivalent civil charge, or both.

C. MINOR VIOLATIONS

Although they may not necessarily directly affect emissions reduction effectiveness, minor violations are considered serious enough to influence the overall effectiveness of the Motor Vehicle Emissions Control Program and pertain to station operations, quality assurance, quality control, unacceptable security of documents and records, and maintenance of required equipment and systems. Emissions repair efficiency and such other items as are necessary to maintain program uniformity, and to ensure the ability to function as a permittee, licensee or certified emissions repair technician or facility, are included in this category.

A violation of any provision of the Regulations not previously listed under subsections B, C and D of 9 VAC 5-91-620 (which are also set forth in Section B above) shall constitute a minor violation, as they pertain to a permittee, licensee or certified emissions repair technician or a facility, unless the Director determines that the violation is a major violation in accordance with subsection F of 9 VAC 5-91-620.

D. PENALTY GUIDELINES FOR A MINOR VIOLATION

1. First Violation

The affected party may be issued a Letter of Reprimand.

2. Second Violation

The affected party may be issued a Letter of Reprimand, followed by negotiated terms and/or conditions of probation, if appropriate.

3. Third and Subsequent Violation(s)

These are considered major violations, and penalties for major violations apply.

4. Cumulative Nature of Minor Violations

Minor violations are cumulative in nature and remain active for 24 months.

ATTACHMENTS

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

WARNING LETTER

Re: [Facility Name]
Permit No. _____
[DEQ Identification Number]

Dear [Facility Contact]:

The Department of Environmental Quality ("DEQ"), [Specific] Regional Office, has reason to believe that [Facility Name] may be in violation of [State Water Control Law/Air Pollution Control Law/Waste Management Act]. An inspection at your facility revealed the following:

> [Give details of factual observations only; do not describe them in terms of violation(s) or conclusions of law. Then, for each fact, state specifically the applicable statutory or regulatory provision that you think applies. This section should refer to the inspection summary or inspection checklist. Use numbered paragraphs for each factual condition being addressed.]

Please review the above and submit a written explanation within 20 days of receipt of this letter regarding the corrective actions your facility intends to take or has taken to correct the situation. Also, a time schedule for these corrective actions should be included.

Your letter will assist our staff in maintaining a complete and accurate record of the compliance status of your facility. Compliance may be verified by on-site inspection or other appropriate means. If corrective action will take longer than 90 days, please submit a plan and

schedule for inclusion in a Letter of Agreement or Consent Order. Failure to respond may result in enforcement action by DEQ.

This Warning Letter is not an agency proceeding or determination which may be considered a case decision under the Virginia Administrative Process Act, Va. Code § 9-6.14:1*et seq*. Your point of contact for resolution of these deficiencies will be [DEQ staff member] at (XXX) XXX-XXXX. Please contact [her/him] if you have any questions about the content of this letter or need additional guidance.

Sincerely,

[Responsible DEQ Staff]
[Title]

cc: Enforcement/Compliance File

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

NOTICE OF VIOLATION

RE: NOV No. _____
[Facility name]
[DEQ Identification Number]

Dear [Facility Contact]:

This letter notifies you of information upon which the Department (ADEQ@) may rely to institute an administrative or judicial enforcement action. It is neither a case decision under the Virginia Administrative Process Act, Code ' 9-6.14:1 *et seq.*, nor an adjudication. I also request that you respond to this letter within 10 days.

FACTS AND LEGAL REQUIREMENTS

Option 1 (Inspections)

On [date], Department of Environmental Quality ("DEQ") Regional Office Staff conducted an inspection of [Facility Name]. The inspection summary [or checklist] is attached. Based on this inspection, DEQ staff has reason to believe that [Facility name] may be in violation of [State Water Control Law/Air Pollution Control Law/Waste Management Act]. The following contains the staff's factual observations and identifies the applicable law and regulations.

> [Give details of factual observations only; do not describe them in terms of violation(s) or conclusions of law. Then, for each fact, state specifically the applicable statutory or regulatory provision that you think applies. This section should refer to the inspection summary or inspection checklist. Use numbered paragraphs for each factual condition being addressed.]

Option 2 (DMR/air reporting/file review)

The DEQ Regional Office has reason to believe that [Facility Name] may be in violation of [State Water Control Law/Air Pollution Control Law/Waste Management Act] and regulations based upon a review of [the Discharge Monitoring Report for [month(s)]/your performance test of [date]/your excess emission report of [date]/agency files/DEQ inspection report dated [date]/correspondence dated [date]/other documentation as appropriate].

> [Give details of factual review only; do not describe them in terms of violation(s) or conclusions of law. Then, for each fact, state specifically the applicable statutory or regulatory provision that you think applies. This section should refer to the inspection summary or inspection checklist. Use numbered paragraphs for each factual condition being addressed.]

ENFORCEMENT AUTHORITY

For the Air Law, include the following:

Code ' 10.1-1316 of the Air Pollution Control Law provides for an injunction for any violation of the Law, the Air Board regulations, an order, or permit condition. The same statute provides for a civil penalty up to $25,000 per day of violation of the Law, regulation, order, or permit condition. Code ' 10.1-1307 authorizes the Board to issue orders, and Code ' 10.1-1309 authorizes the Board to issue special orders to address such violations. In addition, Code ' 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Air Law and regulations, and to impose a civil penalty of not more than $10,000.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

For the Waste Law, include the following:

Code ' 10.1-1455 of the Waste Management Act provides for an injunction for any violation of the Act, any Waste Management Board regulation, any condition of a permit or certification, or order. The same statute provides for a judicially imposed civil penalty up to $25,000 per day of such violation. Code ' 10.1-1455 also authorizes the Board to issue orders to address such violations and impose penalties up to $25,000 per day of violation. In addition, Code ' 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Act and regulations, and to impose a civil penalty of not more than $10,000. Pursuant to Code § 10.1-1455, the Board may issue orders.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

For the Water Law, include the following:

Code ' 62.1-44.23 of the State Water Control Law provides for an injunction for any violation of the Act, any State Water Control Board rule or regulation, order, permit condition, standard, or any certificate requirement or provision. Section 62.1-44.32 provides for a civil penalty up to $25,000 per day of such violation. Code ' 62.1-44.15(8a) authorizes the Board to issue special orders to persons for such violations. In addition, Code '10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Act and regulations, and to impose a civil penalty of not more than $10,000.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

For the Petroleum Storage Tank Law, include the following:

Code ' 62.1-44.34:20 of Article 9 (Storage Tanks) of the State Water Control Law provides for an injunction for any violation of the Law, any State Water Control Board regulation, order, or any term or condition of an approval. Section 62.1-44.34 provides for a civil penalty ranging from $100 up to $100,000 per violation depending on the type of violation. Additional civil penalties can be assessed for each additional day of violation. Code' 62.1-44.34:20 authorizes the Board to issue special orders to persons for such violations. In addition, Code '10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Act and regulations, and to impose a civil penalty of not more than $10,000.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

The staff must make a recommendation about how to proceed with this matter and whether to initiate an enforcement action based upon these facts. Before taking any further action, however, we would like to discuss this matter with you.

Your point of contact is [DEQ staff member] at (XXX) XXX-XXXX. Please contact [her/him] within ten days of the date of this letter if you dispute any of the facts I have stated or if there is other information you believe DEQ should consider. At the same time, please inform

[DEQ staff member] of any corrective action you have instituted or plan to institute and the schedule for doing so.

A meeting to discuss resolution of this matter will be arranged when you talk with [DEQ staff member]. During this meeting, all aspects of the situation will be discussed. You may be asked to enter into a Consent Order with the Department to formalize your plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the payment of civil charges.

Sincerely,

[Name]
Regional Compliance and Enforcement Manager

cc: CASE FILE
SPECIALIST
MEDIA MANAGER

Attachment 2A-3
(12/1/99)

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

LETTER OF AGREEMENT

Re: [Facility Name]
Permit No. _____
[DEQ Identification Number]

Dear [Facility Contact]:

As we have discussed, the following is a Letter of Agreement between [Facility Name] and the Department of Environmental Quality (ADEQ@) proposing a schedule to address violations of your Permits. By signing both originals and returning one original to this office by [Date], you accept the terms of this Letter of Agreement.

> [Give details of permit exceedences or other problems and DEQ's Notices of Violation to the facility. Do not describe exceedences in terms of violation(s) or conclusions of law. For each exceedence, state specifically the applicable statutory or regulatory provision that you think applies. Use numbered paragraphs for each factual condition being addressed.]

[Facility Name] met with DEQ staff to discuss actions being taken to determine the cause(s) of the toxicity and prevent future violations. To that end, [Facility Name] and DEQ have agreed upon the following schedule of corrective action [use numbered paragraphs for the schedule].

Thank you for your cooperation. Please address any questions you have about this Letter of Agreement to [DEQ staff member] at (XXX) XXX-XXXX.

Sincerely,

[Responsible DEQ Staff]
[Title]

cc: Enforcement/Compliance File

Seen and agreed:

_____ _____
Date

Commonwealth of Virginia
City/County of _____

The foregoing document was signed and acknowledged before me this ____ day of

_____, 20XX, by _____, who is
(Name)

_____ on behalf of [Facility Name].
(Title)

_____
Notary Public

My commission expires: _____

Attachment 2A-4
(12/1/99)

[LETTERHEAD]

[BOARD NAME] ENFORCEMENT ACTION
[SPECIAL] ORDER BY CONSENT
ISSUED TO
[FACILITY NAME]

[Permit No. _____]

SECTION A: Purpose

This is a Consent [Special] Order issued under the authority of Va. Code § _____ [see Definition 2], between the [Board] and [Facility Name], for the purpose of resolving certain violations of [environmental law and/or regulations].

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.

2. "Board" means the [State Air Pollution Control Board, a permanent collegial body of the Commonwealth of Virginia as described in Code §§ 10.1-1301 and 10.1-1184 *OR* State Water Control Board, a permanent citizens'board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7 *OR* Virginia Waste Management Board, a permanent collegial body of the Commonwealth of Virginia as described in Code §§ 10.1-1401 and 10.1-1184].

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent [Special] Order.

6. "[Facility Name]" means [full name of individual, corporation, partnership, etc.], certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.

7. "Facility" means the [business location] located in [City/County], Virginia.

8. "_____RO" means the _____ Regional Office of DEQ, located in [City], Virginia.

9. "Permit" means [specify permit], which became effective [date] and expires [date]. Permit limits include [give details].

10. "O&M" means operations and maintenance.

SECTION C: Findings of Fact and Conclusions of Law

1. [Facility Name] owns and operates a facility in the [Location], Virginia. This facility is the subject of [specific permit], which allows [give details].

2. Since the facility opened in [date], DEQ has noted numerous apparent violations of the [State Water Control Law/Air Pollution Control Law/Waste Management Act] and regulations. These problems, noted in a Notice of Violation issued by DEQ [date], include:

   • [use bullets to give details]

3. [Facility Name] has corrected many of the problems cited in the Notice of Violation. [Provide details.]

4. [Facility Name] is working with DEQ staff [give details of actions].

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code [§10.1-1316(C), §10.1-1455(F), or § 62.1-44.15(8a) and (8d)], orders [Facility Name], and [Facility Name] agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders [Facility Name], and [Facility Name] voluntarily agrees, to pay a civil charge of $X,XXX within 30 days of the effective date of the Order in settlement of the violations cited in this Order. Payment shall be made by check payable to the "Treasurer of Virginia", delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of [Facility Name], for good cause shown by [Facility Name], or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to [Facility Name] by DEQ on [date]. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, [Facility Name] admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. [Facility Name] consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. [Facility Name] declares ithas received fair and due process under the Administrative Process Act, Va. Code §§ 9-6.14:1 *et seq.*, and the [State Water Control Law/Air Pollution Control Law/Waste Management Act] and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by [Facility Name] to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of thisOrder is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. [Facility Name] shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. [Facility Name]

shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. [Facility Name] shall notify the DEQ Regional Director in writing when circumstances are anticipated

to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

a. the reasons for the delay or noncompliance;

b. the projected duration of any such delay or noncompliance;

c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and [Facility Name]. Notwithstanding the foregoing, [Facility Name] agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to [Facility Name]. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve [Facility Name] from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, [Facility Name] voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of _____, 20XX.

_____
[Name], Director
Department of Environmental Quality

[Facility Name] voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Commonwealth of Virginia

City/County of _____

The foregoing document was signed and acknowledged before me this___ day of _____, 20XX, by _____, who is
(name)

_____ of [Facility Name], on behalf of the Corporation.
(title)

_____
Notary Public

My commission expires:_____.

APPENDIX A

[Facility Name] shall:

1.

2.

3.

Attachment 2A-5
(12/1/99)

CONFIDENTIAL

ENFORCEMENT RECOMMENDATION & PLAN (ERP)

REGION:

DATE:

FACILITY / OWNER:

LOCATION:

PERMIT / REGISTRATION NO. (if applicable)**:**

MEDIUM: **SIGNIFICANT VIOLATOR: ___ yes ___no**

STATE WATERS AFFECTED (if applicable)**:**

VIOLATIONS:

Citation(s)	Description

CASE SUMMARY:

RESOURCE DAMAGES AND/OR POTENTIAL FOR HARM:

EFFECT ON REGULATORY PROGRAM (if applicable):

PREFERRED ACTION:

RECOMMENDED CIVIL CHARGE: (also see attached)

RECOMMENDED BY:

CONCURRENCE (initial and date)**:**

_____ _____ _____ _____

Compliance/Enforcement Manager date Regional Director date

COMMENTS:

cc: OEC, Central Office

Attachment 2A-6
(12/1/99)

[LETTERHEAD]

[Date]

Registrar of Regulations
Virginia Code Commission
910 Capitol Street
2nd Floor
Richmond, Virginia 23219

Attention: Deputy Registrar

Re: General Notice
[Facility Name]

Dear Sir or Madam:

Enclosed are three copies of a general notice regarding a proposed special order for [Facility name]. Please publish this notice in the General Notices section of the next issue of the Virginia Register. To assist me in the tracking of the notice period, please stamp the date you received the enclosed notice on one of the copies I have provided and return it to me.

Sincerely,

[DEQ Staff]
[Title]

Enclosures (3)

cc: Enforcement/Compliance File

[LETTERHEAD]

EXECUTIVE COMPLIANCE AGREEMENT

[STATE AGENCY]

This is an Executive Compliance Agreement (the "Agreement") between the [State Agency] and the Virginia Department of Environmental Quality ("DEQ") pursuant to the Director's authority, as set forth in Sections _____ of the Code of Virginia, to administer and enforce the [State Water Control Law/Air Pollution Control Law/Waste Management Act] and regulations.

[Set forth relevant statutory and regulatory requirements]

[Set forth relevant facts supporting violations]

To remedy these matters, [State Agency] and DEQ agree to the schedule of action in Appendix A.

This Agreement shall become effective upon the date of its execution by the Director of the Department of Environmental Quality or his designee. [State Agency] agrees to be bound by any compliance dates in this Agreement which may predate its effective date.

_____ _____

[Name], Agency Head Date
[State Agency]

_____ _____

[Name], Director Date
Department of Environmental Quality

[STATE AGENCY]

APPENDIX A

[State Agency] agrees to:

1.

2.

3.

4.

5.

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

Dear [Facility Contact]:

As you are aware, [Facility Name] has been issued [X] Notices of Violation in the last [X] months for alleged violations of State Water Control Law at your facilities. In addition, as my staff has discussed with you, inspections at your facility have revealed either contamination or the potential for contamination of ground and surface water.

The Department of Environmental Quality's ("DEQ") staff has reason to believe that the alleged violations of the State Water Control Law and regulations in this matter are serious enough to warrant seeking judicial remedies, which may include injunctive relief and/or civil penalties. The staff intends to recommend to the State Water Control Board at its [date] meeting that it consider authorizing DEQ to request the Attorney General to seek appropriate legal action for these violations of State Law. Legal action may include a civil penalty of up to $25,000 per day for unpermitted discharges of pollutants to state waters.

You may wish to be present during the staff's presentation to the Board on this matter. Please understand that this is not a hearing nor is a hearing required under any provisions of the law. However, the Board in its discretion and in order to more clearly ascertain the facts in this matter, may allow you to make a statement on your behalf or may have some questions. Any statement or answers may be limited as to content or duration.

Please be advised that any decision by the Board to refer this matter to the Attorney General for legal action will not be a determination of liability against [Facility Name], only a decision that a determination of liability by court action may be appropriate. Therefore, the Board will act on this matter whether or not you or your representative choose to be present. Moreover, the Assistant Attorney General who would handle any litigation on this matter will be present to advise the Board.

This matter will be presented to the Board on [date] at [location], at [time], or as soon thereafter as possible, depending on such other matters as may be before the Board.

The Virginia State Water Control Law at Code § 62.1- 44.15(8d) allows the Board to provide for the payment of a civil charge through the issuance of a consent special order. You may wish to pursue this administrative alternative to avoid a costly and protracted legal proceeding and the potential liability for court imposed civil penalties.

Should an administrative settlement be negotiated, the terms of the agreement in a consent special order would be presented to the Board at its [date] meeting. Such consent special order must receive public notice for a 30-day period and must be approved by the Board prior to issuance by the Director. If you wish to discuss such a settlement, please contact [DEQ staff] at (XXX) XXX-XXXX. If we do not hear from you by [date five days prior to Board meeting], this matter will be presented to the Board with the recommendation that the Board authorize DEQ to request judicial action by the Attorney General's Office.

Sincerely,

[DEQ Staff]
[Title]

CRIMINAL INVESTIGATION UNIT - NOTIFICATION ROUTING - CONFIDENTIAL

TO: Criminal Investigation Unit

Facility Name:_____ PC #:_____
Address:_____ Permit #:_____
Location:_____ Phone #:_____
Facility owner(s):_____ Operator:_____ Contact:_____
Vio. Reported By:_____ Date Vio. Reported:_____ Region:___

CATEGORIES OF NON COMPLIANCE
PROGRAM(S) VIOLATED:
_____
_____
_____
_____

ALLEGED POTENTIAL CRIMINAL VIOLATIONS:
MISDEMEANOR: WILLFUL [ ] NEGLIGENT [ ]
FELONY: KNOWING VIOLATION [ ]
KNOWING FALSE STATEMENT [ ]
KNOWING MEASURING DEVICE [ ]
KNOWING IMMINENT DANGER [ ]

DESCRIPTION OF ALLEGED VIO.(S) Vio. Date:_____ (List each date if diff.)

EVIDENCE (ATTACH PERTINENT DOCUMENTS)

STAFF WITNESS:	[ ]	OTHER WITNESS: (signed statements)	[ ]
FILE/DOCUMENTS:	[ ]	CAS INDICATOR/PRINTOUT:	[ ]
DMRS:	[ ]	SUSPICIOUS REPORT:	[ ]
PICTURES:	[ ]	SUSPICIOUS ACTIVITY:	[ ]
VIDEO TAPES:	[ ]	VERBAL REPORT:	[ ]
LAB DATA:	[ ]	OTHER NON-HARD EVIDENCE:	[ ]
OTHER HARD EVID.:	[ ]		

ENVIRONMENTAL IMPACT LIST STATE WATER(S) IMPACTED: _____
NO [ ] YES [ ] UNKNOWN [ ] (Describe below or use attachment)

ECONOMIC ADVANTAGE
NO [ ] YES [ ] UNKNOWN [ ] (Describe below or use attachment)

COMPLIANCE _____ _____
ENFORCEMENT _____ _____
DATE

CONCURRENCES

_____ _____ _____ _____
ENF. MANAGER DATE REG. DIR. DATE

COMMENTS:

CASE CLOSURE/DEREFERRAL MEMORANDUM

TO: File

FROM: _____

THROUGH: _____

DATE: _____

COPY: _____

RE: [Case name]

[ ] Permitted Facility. Permit No.: _____

[ ] Complaint. Complaint No.: _____

Referral Date: _____

Location and/or Address: _____

Reason for CLOSURE:

[ ] Compliance achieved through informal action.

[ ] Letter of Agreement issued.

[ ] Consent order issued.

[ ] Referral. Referred to:
Contact: _____
Phone: _____

Comments: _____

_____

Reasons for DEREFERRAL: _____

_____

Date Closed/Dereferred: _____

Recommended by: _____

Name Title Date

Concurrence:

_____ _____

Enforcement Manager Date Media Manager Date

_____ _____

Regional Compliance Manager Date Regional Director Date

Copies: [Central Office]
[Regional Manager]

Closed By: _____

Attachment 2A-11
(12/1/99)

[LETTERHEAD]

[Date]

WARNING LETTER

CERFIFIED MAIL
RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

RE: Warning Letter No.
UST Compliance at [Facility Address]
FAC ID NO. [ ]

Dear [Facility Contact]:

The Department of Environmental Quality's ("DEQ") [Specific] Regional Office has reason to believe that [Facility Name] may be in violation of the State Water Control Law ("Water Law") and regulations based upon review of the Department's files and our [Inspection date] inspection of the underground storage tank ("UST") facility identified above. The enclosed "UST Facility Checklist" contains the staff's review of the facility's apparent compliance status with 9 VAC 25-580-60 (Upgrading of Existing UST Systems). As you know, all UST facilities were to have come into full compliance with these provisions by December 22, 1998.

Please review the attached checklist immediately and submit by [Date] a written explanation of the corrective action(s) you have instituted or plan to institute and the schedule for doing so. Compliance may be achieved by UST upgrade, replacement or closure in accordance with UST regulatory requirements.

Your letter will assist our staff in maintaining a complete and accurate record of the compliance status of your facility. Compliance may be verified by onsite inspection or other appropriate means. If correction of these deficiencies will take longer than 30 days, a plan and schedule will be included in a Letter of Agreement ("LOA"), with compliance expected within 90 days. A draft LOA is attached for your consideration and signature.

Failure to respond may result in enforcement action by DEQ. Virginia Code § 62.1-44.32 provides for a civil penalty up to $25,000 per violation, per day of violation. Code §62.1-44.15(8a) authorizes the Board to issue special orders to persons for such violations. In addition, Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Water Law and regulations and to impose a civil penalty of not more than $10,000.

This Warning Letter is neither a case decision under the Virginia Administrative Process Act, Virginia Code § 9-6.14:1 *et seq,* nor an adjudication. Please contact me at (XXX) XXX-XXXX, if you have any questions regarding this letter. Your prompt cooperation is appreciated.

Sincerely,

[Responsible DEQ Staff]
Inspector

Enclosures

cc: Compliance Auditor
Compliance File
OSR
OEC

Attachment 2A-12
(12/1/99)

[LETTERHEAD]

[Date]

NOTICE OF VIOLATION

CERTIFIED MAIL
RECEIPT EQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

RE: Notice of Violation No.
UST Compliance at [Facility Address]
FAC ID NO. [ ]

Dear [Facility Contact]:

This letter notifies you of information upon which the State Water Control Board or the Department of Environmental Quality Director may rely to institute an administrative or judicial enforcement action. It is neither a case decision under the Virginia Administrative Process Act, Virginia Code § 9-6.14:1 *et seq*., nor an adjudication. With this letter, I also request that you respond to this letter within ten days.

FACTS AND LEGAL REQUIREMENTS

The Department of Environmental Quality's ("DEQ") [Specific] Regional Office has reason to believe [Facility Name] may be in violation of the State Water Control Law ("Water Law") and regulations based upon review of the Department's files and our [date] inspection of the underground storage tank ("UST") facility identified above. The enclosed "UST Facility Checklist" contains the staffs review of the facility's apparent compliance status with 9 VAC 25-580-60 (Upgrading of Existing UST Systems). As you know, all UST facilities were to have come into full compliance with these provisions by December 22, 1998.

ENFORCEMENT AUTHORITY

Virginia Code § 62.1-44.23 of the Water Law provides for an injunction for any violation of the Water Law, any State Water Control Board rule or regulation, order, permit condition, standard, or any certificate requirement or provision. Code § 62.1-44.32 provides for a civil

penalty up to $25,000 per violation, per day of violation. Code § 62.1-44.15(8a) authorizes the Board to issue special orders to persons for such violations. In addition, Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Water Law and regulations and to impose a civil penalty of not more than $10,000.

FUTURE ACTIONS

The Staff must make a recommendation about how to proceed with this matter and whether to initiate an enforcement action based upon these facts. Before taking any further action, however, we would like to discuss this matter with you.

Please contact me by [Date] at (XXX) XXX-XXXX if you dispute any of the facts I have stated or if there is other information you believe DEQ should consider. At the same time, please advise of any corrective action(s) you have instituted or plan to institute and a schedule for doing so. Compliance may be achieved by UST system upgrade, replacement or closure in accordance with UST regulations.

A meeting to discuss resolution of this matter will be arranged when you call. During this meeting, all aspects of the situation will be discussed. You may be asked to enter into a Consent Special Order with the Department to formalize your plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the payment of civil charges.

Sincerely,

[Responsible DEQ Staff]

Enclosure

cc: Compliance Auditor
Compliance File
OSRR
OEC

Attachment 2A-13
(12/1/99)

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

LETTER OF AGREEMENT

RE: Letter of Agreement No.
UST Compliance at [Facility Address]
FAC ID NO. [ ]

Dear [Facility Contact]:

As per our discussion of [date], the following is a Letter of Agreement between [Facility Name] and the Department of Environmental Quality (ADEQ@) proposing a schedule that will bring your facilities into full compliance with 9 VAC 25-580-60 (Upgrading of Existing Underground Storage Tank (AUST@) Systems). By signing both originals and returning one original to this office by [Date], you accept the terms in this Letter of Agreement.

[Facility Name] and the Department of Environmental Quality, [Specific] Regional Office, agree that [Facility Name] shall:

1. **By [Date],** complete all necessary upgrades of USTs at its facility at [Facility Address] in accordance with 9 VAC 25-580-60.

2. **By [Date],** submit documentation to [Region Office] in accordance with 9 VAC 25-580-70 that all work required by Item 1 has been completed.

3. **By [Date],** complete all necessary upgrades of USTs at its facility at [Facility Address] in accordance with 9 VAC 25-580-60.

4. **By [Date],** submit documentation to [Region Office] in accordance with 9 VAC 25-580-70 that all work required by Item 3 has been completed.

5. [Facility Name] understands that failure to comeinto full compliance with the underground storage tank technical regulation (9 VAC 25-580-10 *et seq*.) by the deadline in this Agreement may result in the Regional Office initiating enforcement action that may include a substantial civil charge, including recovery of the economic benefit of noncompliance.

Thank you for your cooperation. Please address any questions you have about this Letter of Agreement to [DEQ Staff] at (XXX) XXX-XXXX.

Sincerely,

[Responsible DEQ Staff]

Seen and agreed to on behalf of [Facility Name]:

_____ _____

Date Name

_____

Title

cc: OEC
OSRR
Enforcement file

Attachment 2A-14
(12/1/99)

[LETTERHEAD]

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

A SPECIAL ORDER BY CONSENT ISSUED TO

[Facility Name]

[Facility Address]

SECTION A: Purpose

This is a Special Order by consent issued under the authority of §§ 62.1-44.15 (8a) and (8d) of the Code of Virginia issued by the State Water Control Board between the Board and [Facility Name] to resolve certain violations of the State Water Control Law and regulations, resulting from failure to upgrade, replace or close existing UST systems at [Facility Name] UST facility located at [Facility Address].

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Code §§ 10.1-1184 and 62.1-44.7.
2. "Code" means the Code of Virginia (1950), as amended.
3. "The Company" or "[Abbreviated Facility Name]" means [Facility Name], a company incorporated in the State of Virginia, federal tax identification number [ ].
4. "Department" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality.
6. "The Facility" means the retail gasoline station and USTs owned and operated by [Facility Name and Address]. The Facility's USTs are further identified as UST ID#[ ].

7. "Order" means this document, also known as a Consent Special Order.
8. "Regional Office" means the [Specific] Regional Office of the Department.
9. "The Regulation" means 9 VAC 25-580-60 (Upgrading of Existing UST Systems), which requires that all USTs meet final, specific performance requirements for leak detection, spill and overfill protection, and corrosion protection by December 22, 1998.
10. "UST" means underground storage tank.

SECTION C: Findings of Fact and Conclusions of Law

1. The Regulation requires that all USTs meet final, specific performance requirements for leak detection, spill and overfill protection, and corrosion protection by December 22, 1998.
2. [Facility Name] is an UST owner and/or operator within the meaning of Code § 62.1-44.34:8.
3. [Facility Name] failedto meet the December 22, 1998 deadline for UST compliance at the Facility as required by the Regulation. The failure was documented by a Department inspection of the Facility conducted on [date] (see the attached UST Facility Checklist), and in Notice of Violation No. [ ] issued by the Department [date].

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of its authority in Code §§ 62.1-44.15 (8a) and (8d), orders [Facility Name] and [Facility Name] agrees:

1. To remedy the violations described above and bring the Facility into compliance with the Regulation, [Facility Name] shall perform the actions described in Appendix A to the Order.
2. [Facility Name] shall pay a civil charge of $XXX within 30 days of the effective date of the Order. Payment shall be by check, certified check, money order, or

cashier's check payable to "Treasurer of Virginia" and sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of [Facility Name], for good cause shown by [Facility Name], or on its own motion after notice and opportunity to be heard.
2. This Order addresses only those violations specifically identified herein. This Order shall not preclude the Board or Director from taking any action authorized by law, including, but not limited to: (1) taking any action regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Facility as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.
3. For purposes of this Order and subsequent actions with respect to this Order, [Facility Name] admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. [Facility Name] consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. [Facility Name] declares it has received fair and due process under the Virginia Administrative Process Act, Code §§ 9-6.14:1 *et seq.,* and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation and to judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by [Facility Name] to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall act to waive

or bar the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. [Facility Name] shall be responsible for failing to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. [Facility Name] must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. [Facility Name] shall notify the Director of the Regional Office in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;
   b. the projected duration of such delay or noncompliance;
   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

   Failure to so notify the Director of the Regional Office in writing within 10 days of learning of any condition listed above, which [Facility Name] intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and [Facility Name]. Notwithstanding the foregoing, [Facility Name] agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

    a. [Facility Name] petitions the Regional Director to terminate the Order after it has completed all requirements of the Order. The Director's determination that [Facility Name] has satisfied all the requirements of the Order is a "case decision" within the meaning of the Virginia Administrative Process Act; or

    b. The Director or the Board may terminate this Order in his or its whole discretion upon 30 days' written notice to [Facility Name].

    Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve [Facility Name] from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, [Facility Name] voluntarily agrees to the issuance of this Order.

And it is so ORDERED this_____ day of _____, 20XX.

_____
[Name], Director
Department of Environmental Quality

[Facility Name] voluntarily agrees to the issuance of this Order.

Date: _____ By:

Title:

Commonwealth of Virginia
City/County of

The foregoing document was signed and acknowledged before me this_____ day of

_____, 20XX, by _____, who is
(name)
_____ of [Facility Name], on behalf of the Corporation.
(title)

_____.
Notary Public

My commission expires:_____.

Appendix A

[Facility Name]

[Facility Address]

[Facility Name] shall:

1. By [date], ensure that it has submitted accurate, up to date Financial Responsibility documentation for the facility in accordance with 9 VAC 25-590-10 *et seq.*

2. By [date] ensure that it has submitted accurate, up to date registration forms for the facility in accordance with 9 VAC 25-580-10*et seq*.

3. (PLAN AND SCHEDULE FOR UST COMPLIANCE)

EXECUTIVE COMPLIANCE AGREEMENT

[STATE AGENCY]

REGARDING

[STATE FACILITY]

This is an Executive Compliance Agreement (the "Agreement") between the [State Agency] and the Virginia Department of Environmental Quality ("DEQ") pursuant to the Director's authority, as set forth in §§ 62.1-44.14 and 10.1-1185 of the Code of Virginia, to exercise general supervision and control over the quality and management of State waters and to administer and enforce the State Water Control Law.

The [State Agency] operates [number] underground storage tanks (AUSTs@) at [State Facility]. 9 VAC 25-580-60 (Athe Regulation@) requires that all USTs meet final, specific performance requirements for leak detection, spill and overfill protection and corrosion protection by December 22, 1998. [State Agency] failed to meet the December 22, 1998 deadline for UST compliance as required by the Regulation. The failure was documented by a Department Inspection at [State Facility] conducted on [date] (see attached UST Facility Checklist), and in Notice of Violation No. [XXXX] issued by the Department on [Date].

To remedy these matters, [State Agency] and DEQ agree to the schedule of action in Appendix A.

This Agreement shall become effective upon the date of its execution by the Director of the Department of Environmental Quality or his designee. [State Agency] agrees to be bound by any compliance dates in this Agreement which may predate its effective date.

_____ _____

[Name], Director Date
[State Agency]

_____ _____

[Name], Director Date
Department of Environmental Quality

[LETTERHEAD]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Name]
[Street Address]
[City, State, Zip Code]

NOTICE OF VIOLATION

RE: NOV No. _____
[Facility Name]
[DEQ Identification Number]

Dear [Facility Contact]:

This letter notifies you of information upon which the Department (ADEQ@) may rely to institute an administrative or judicial enforcement action. It is neither a case decision under the Virginia Administrative Process Act, Code ' 9-6.14:1 *et seq.*, nor an adjudication. I also request that you respond to this letter within 10 days.

The DEQ [Specific] Regional Office has reason to believe that [Facility Name] may be in violation of the State Water Control Law and regulations based upon a review of the Discharge Monitoring Report for month(s). The attached listing contains the staff's review and comments and identifies the applicable law and regulations. [Attach relevant DMRs.]

Code ' 62.1-44.23 of the State Water Control Law provides for an injunction for any violation of the Law, any State Water Control Board rule or regulation, order, permit condition, standard, or any certificate requirement or provision. Section 62.1-44.32 provides for a civil penalty up to $25,000 per day of such violation. Code ' 62.1-44.15(8a) authorizes the Board to issue special orders to persons for such violations. In addition, Code '10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Act and regulations, and to impose a civil penalty of not more than $10,000.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

The staff must make a recommendation about how to proceed with this matter and whether to initiate an enforcement action based upon these facts. Before taking any further action, however, we would like to discuss this matter with you.

Your point of contact is [DEQ staff member] at (XXX) XXX-XXXX. Please contact her/him within ten days of the date of this letter to discuss this matter. At the same time, please inform [DEQ staff member] of any corrective action you have instituted or plan to institute and the schedule for doing so.

A meeting to discuss resolution of this matter will be arranged when you talk with [DEQ staff member]. During this meeting, all aspects of the situation will be discussed. You may be asked to enter into a Consent Order with the Department to formalize your plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the payment of civil charges.

Sincerely,

[Name]
Compliance and Enforcement Manager

Enclosure

cc: CASE FILE
SPECIALIST
MEDIA MANAGER